E COPY

72-5

Supreme Court, U. S.
F I L E D
JUN 29 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. .

HAROLD E. KOHN, Trustee, et. al.,
Petitioners,

v.

AMERICAN METAL CLIMAX, INC. and
ROAN SELECTION TRUST LIMITED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HAROLD E. KOHN,
AARON M. FINE,
STUART H. SAVETT,
ARTHUR M. KAPLAN,
Suite 1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
Attorneys for Petitioners.

Of Counsel:
HERBERT E. MILSTEIN,
1776 "K" Street, N.W.
Washington, D. C.

June 29, 1972.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATUTES AND REGULATION INVOLVED	2
BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT	8
STATEMENT OF THE CASE	9
REASONS FOR GRANTING THE WRIT	14
Comity Should Not Have Been Applied to Bar Damages for Violation of the Securities Exchange Act of 1934 Through Application of a Mixed Finding of Law and Fact Derived From a Foreign, Non-Adversary Proceeding	14
(a) Canada Southern R. R. v. Gebhard Is Not Determinative and Its Relation to Later Legislation Should Be Clarified	15
(b) The Zambian Decree Should Not Have Been Applied to Bar Recovery From AMAX	20
(c) The Court Should Affirm the Continued Vitality of Charles T. Cromwell v. County of Sac in Support of the Integrity of the Securities Exchange Act	21
(d) Collateral Estoppel in Cases Under the Securities Exchange Act Should Not Extend to Mixed Findings of Law and Fact	21
CONCLUSION	29

TABLE OF CITATIONS.

Cases: Page

Abramson v. Pennwood Investment Corp., 392 F. 2d 759 (2d Cir. 1968) 23

Affiliated Ute Citizens of Utah v. United States, — U. S. —, 31 L. Ed. 741 (1972) 22, 28

American Distilling Co. v. Brown, 295 N. Y. 36, 64 N. E. 2d 347 (1945) 22

Canada Southern R. R. v. Gebhard, 109 U. S. 527 (1883) 15, 16, 20

Carruth v. Imperial Chemical Industries, Ltd., (1937) A. C. 707 (H. L.) 25

J. I. Case Co. v. Borak, 377 U. S. 426 (1964) 24

Charles T. Cromwell v. County of Sac, 94 U. S. 351 (1877) .. 21

Drachman v. Harvey, 453 F. 2d 722 (2d Cir. 1972) 22

Emanuel v. Symon, (1908) 1 K. B. 302, C. A. 19

Fontaine v. Securities and Exchange Commission, 259 F. Supp. 880 (D. P. R. 1966) 16

Hanson v. Denckla, 357 U. S. 235 (1958) 19

Hilton v. Guyot, 159 U. S. 113 (1895) 19

Investment Associates, Inc. v. Standard Power & Light Corp., 29 Del. Ch. 225, 48 A. 2d 501 (1946), aff'd. 51 A. 2d 572 (1947) 22

Janigan v. Taylor, 344 F. 2d 781 (1st Cir.), cert. den., 382 U. S. 879 (1965) 27

Kane v. Central American Mining & Oil, Inc., 235 F. Supp. 559 (S. D. N. Y. 1964) 19, 22

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955) 20

Levine v. Silverman, 43 Misc. 2d 415, 251 N. Y. S. 2d 68 (1954) 22

McClure v. Borne Chemical Co., 292 F. 2d 824 (3rd Cir.), cert. den., 368 U. S. 939 (1961) 22

McCollum v. Billings, 53 Misc. 2d 661, 279 N. Y. S. 2d 609 (1967) 22

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Movielab, Inc. v. Berkey Photo, Inc., et al., 321 F. Supp. 806 (S. D. N. Y. 1970), aff'd. on other grounds, 452 F. 2d 662 (2d Cir. 1971) 23

New Zealand Loan and Mercantile Agency Company, Ltd. v. Morrison, (1898) A. C. 349, P. C. 18

Rachal v. Hill, 435 F. 2d 59 (5th Cir. 1970), cert. den. 403 U. S. 904 (1971) 19, 22

Russell v. Place, 94 U. S. 606 (1876) 24

Schibsby v. Westenholz, L. R. 6 Q. B. 155 (1870) 18

Schoenbaum v. Firstbrook, 405 F. 2d 200, affirmed in part, reversed in part on other grounds, 405 F. 2d 215 (2d Cir. 1968, en banc), cert. den. sub nom., Manley v. Schoenbaum, 395 U. S. 906 (1969) 16

SEC v. National Securities, Inc., 393 U. S. 453 (1969) 18, 22

Superintendent of Insurance of New York v. Bankers Life and Casualty Co., 404 U. S. 6 (1971) 22

Vernitron Corporation v. Benjamin, 440 F. 2d 105 (2d Cir.), cert. den., 402 U. S. 987 (1971) 23

Authorities:

Goodrich Handbook of the Conflict of Laws (3d Ed. 1949) .. 17

1B Moore, Federal Practice (1965 Ed.):

¶ 0.443[4], at 3915 24

¶ 0.444[2] 21

Restatement of the Law of Judgments:

§ 68, Comment D 21

§ 68, Comment F 21

White, Note: The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934, 46 N. Y. U. L. Rev. 936 (1971) 28

TABLE OF CITATIONS (Continued).

Statutes: Page

Securities Exchange Act of 1934:

Section 10(b), 15 U. S. C. § 78j 2, 9, 11, 23, 26

Section 27, 15 U. S. C. § 78aa 8, 21, 22

Regulations, Rule 10b-5, 17 C. F. R. § 240.10b-5 ...2, 9, 11, 12

Zambia Companies Ordinance, Sections 14 through 20 and 104, Cap. 216, Laws of Zambia, Rev. Ed. 1965 .....2, 3, 4, 5, 6, 7, 8

TABLE OF CONTENTS OF APPENDIX.

Vol. 1
Page

A. Opinion of the United States Court of Appeals for the Third Circuit dated March 31, 1972 1

Vol. 2
Page

B. Judgment of the Court of Appeals for the Third Circuit dated March 31, 1972 111

C. Order of the United States Court of Appeals for the Third Circuit dated April 17, 1972 113

D. Order of the United States Court of Appeals for the Third Circuit dated April 27, 1972 116

E. Findings of Fact, Conclusions of Law, Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dated June 8, 1970 117

F. Order of the United States District Court for the Eastern District of Pennsylvania dated August 12, 1970 142

G. Order of the United States Court of Appeals for the Third Circuit dated August 13, 1970 146

H. Findings of Fact, Opinion, Conclusions of Law and Order of the United States District Court for the Eastern District of Pennsylvania dated November 25, 1970 155

I. Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dated January 15, 1971 227

J. Order of the United States District Court for the Eastern District of Pennsylvania dated January 16, 1971 234

K. Order of the United States District Court for the Eastern District of Pennsylvania dated January 18, 1971 237

L. Order of the High Court for Zambia dated August 14, 1970 246

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered on March 31, 1972 in its Case Nos. 19,537, 19,538, 71-1099, 71-1100 and 71-1101, entitled *Harold E. Kohn, Trustee, et al. v. American Metal Climax, Inc., et al.*

OPINIONS BELOW.

The opinions of the District Court are reported at 313 F. Supp. 1251 and 322 F. Supp. 1331 and are reproduced in the appendix to this petition (App. 117-41, 155-236, respectively). The opinion of the Court of Appeals is not yet reported; it is reproduced in the appendix to this petition (App. 1-110).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on March 31, 1972 (App. 111-12). A petition for rehearing was denied on April 27, 1972 (App. 116). The Jurisdiction of this court is invoked under United States Code, Title 28, Section 1254(1).

QUESTION PRESENTED.

Did the Court of Appeals err in limiting the relief otherwise available to United States shareholders for violation of the Securities Exchange Act of 1934, on the ground that the comity to be accorded to a foreign non-adversary proceeding, precluded such relief?

STATUTES AND REGULATION INVOLVED.

Section 10(b) of the Securities Exchange Act of 1934, United States Code, Title 15, Section 78j, Rule 10b-5, Code of Federal Regulations, Section 240.10b-5, promulgated thereunder, and Sections 14 through 20 and 104 of the Zambia Companies Ordinance, Cap. 216, Laws of Zambia, Rev. Ed. 1965, deemed relevant below by respondents, are as follows:

Section 10(b):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

• • •

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

"(a) to employ any device, scheme or artifice to defraud,

"(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in

order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Sections 14 through 20 and 104 of the Zambia Companies Ordinance.

"14. (1) Subject to confirmation by the Court a company if so authorised by its articles of association as originally framed or as amended by special resolution, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

"(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

"(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

"(*c*) either with or without extinguishing or reducing the liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum of association by reducing the amount of its share capital and of its shares accordingly.

"(2) A special resolution under this section is in this Ordinance called a resolution for reducing share capital.

"15. Where a company has passed a resolution for reducing share capital, it may apply to the Court by petition for an order confirming the reduction.

"16. On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction the company shall add to its name, until such date as the Court may fix, the words 'and reduced' as the last words in its name and those words shall until that date be deemed to be part of the name of the company:

"Provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words 'and reduced'.

"17. (1) Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

"(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

"(3) Where a creditor entered on the list, whose debt or claim is not discharged or determined, does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing the payment of his debt or claim by appropriating, as the Court may direct, the following amount, that is to say—

"(*a*) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

"(*b*) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

"18. The Court, if satisfied with respect to every creditor of the company who under this Ordinance is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined or has

been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

"19. (1) The Registrar, on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of such capital, the number of shares into which it is to be divided, the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

"(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

"(3) Notice of the registration shall be published in such manner as the Court may direct.

"(4) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Ordinance with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

"20. (1) The minute, when registered, shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be as valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

"(2) If a company makes default in complying with the requirements of this section, it shall be liable

to a fine not exceeding one pound for each copy in respect of which default is made, and every director, manager, secretary or other officer of the company who knowingly and willfully authorises or permits the default shall be liable to the like penalty.

* * *

"104. (1) A resolutioin shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members as being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

"(2) A resolution shall be a special resolution when it has been passed by such majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given:

"Provided that, if it is so agreed by a majority in number of the members having the right to attend and vote at any such meeting, being a majority together holding not less than ninety-five per centum in nominal value of the shares giving that right, or, in the case of a company not having a share capital, together representing not less than ninety-five per centum of the total voting rights at that meeting of all the members, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

"(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be

passed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

"(4) In computing the majority on a poll demanded on the question that an extraordinary resolution or a special resolution be passed, reference shall be had to the number of votes cast for and against the resolution.

"(5) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by this Ordinance or the articles."

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT.

Section 27 of the Securities Exchange Act of 1934, United States Code, Title 15, Section 78aa.

STATEMENT OF THE CASE.

This case arises out of the amalgamation [1] of defendant-respondent Roan Selection Trust Limited (RST), a Zambian Corporation, into defendant-respondent American Metal Climax, Inc. (AMAX), a New York corporation, which prior to the consummation of the merger owned 42.3% of the outstanding stock of RST.

The original Complaint filed April 8, 1970, was brought derivatively on behalf of RST and representatively on behalf of all RST shareholders other than AMAX (the class) to enjoin the amalgamation. Under the terms of the amalgamation the class was to receive a combined package of securities and cash for their interest in RST, which would become a wholly-owned subsidiary of and whose assets would be transferred to AMAX. The Complaint alleges, *inter alia,* (1) violations of Section 10(b) of the Securities Exchange Act of 1934 (the Act), 15 U. S. C. § 78j, and Rule 10b-5 promulgated thereunder, 17 C. F. R. § 240.10b-5, (2) a conspiracy to violate that Section and Rule between and among AMAX and the RST directors, and (3) that the terms of the amalgamation are unfair to the class.

Other than AMAX, there were approximately 40,000 United States RST shareholders who owned prior to the merger approximately 38% of the outstanding stock of that company and 67% of the stock not owned by AMAX. RST's American depositary receipts are listed for trading on the New York Stock Exchange. The Morgan Guaranty Trust Company of New York serves as the American depositary for RST shares, and mails the reports, announcements, documents, circulars, and cash dividends of RST to American shareholders.

---

1. This is equivalent to the term "merger" used in the United States.

On August 12, 1970, the United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction enjoining RST from proceeding before a Zambian court to seek confirmation of the AMAX acquisition of RST stock from the class. The District Court concluded, *inter alia*, that the petitioners had demonstrated a strong probability that the proxy material on the basis of which shareholder approval was obtained was violative of Section 10(b) of the Act and Rule 10b-5 and that the terms of the acquisition were unfair to the class.

The following day, the Court of Appeals for the Third Circuit stayed that order for a preliminary injunction upon the representation by counsel for AMAX that AMAX would provide a bond or escrow fund of $10 million to secure petitioners against any injury flowing from a stay. During the argument on the motion to stay, Judge Kalodner noted: "The fund would be recoverable subject to whatever damages shall be found." (App. 153). The Court of Appeals ordered payment of such securty, noting in its Opinion granting the stay that:

> "In the course of the argument before us Marvin Schwartz, Esquire counsel for American Metal Climax, Inc. one of the Appellants, informed the Court of the willingness of American Metal Climax, Inc. to provide substantial security against any injury which Appellee may suffer from the entry of the stay of the Preliminary Injunction". (App. 146-47)

Defendant RST immediately proceeded before the Zambian Court to seek approval of amalgamation.[2] No named plaintiff or intervenor or representative of a named plain-

2. The Zambian proceeding had been commenced subsequent to the filing of the subject complaint and was in the form of a non-adversary corporate reorganization in which respondent RST was the only party.

tiff or intervenor was within the personal jurisdiction of the Zambian court. No person argued in opposition to the amalgamation. The hearings and consideration by the Zambian court were completed in three hours time on August 14, 1970, concluding with the immediate entry of a decree of confirmation (App. 246-48). That orders states the bare conclusion that the amalgamation is fair and reasonable (App. 247). It fails to comment on any part of the record in the District Court, submitted by RST to the Zambian court, including petitioners' allegations or the findings upon which the injunction was based.

Petitioners, on September 14, 1970, were granted leave to and did file an amended and supplemental complaint, alleging, *inter alia*, several additional violations of Section 10(b) and Rule 10b-5. These violations, consisting of material misrepresentations and omissions, were ascertained during discovery which took place subsequent to the Zambian court hearing. They were not alleged in the materials which RST submitted to that tribunal.

On November 25, 1970 the District Court, after trial, filed its Findings of Fact, Opinion, Conclusions of Law and Order, reported at 322 F. Supp. 1331 and appended (App. (155-226). That Opinion and Order, as amended on plaintiffs' motion, found, *inter alia*, various violations of Section 10(b) and Rule 10b-5 and that the terms of the merger were unfair to the class, granted certain equitable relief by ordering AMAX to offer all members of the class a pro rata share in the company to which AMAX had transferred RST assets, ordered supplementary hearings to be held, following appeal to the Court of Appeals, to determine whether any further or different relief, including damages, would be appropriate, and rejected the respondents' contention that the Zambian decree precluded any finding of liability or grant of relief by the District Court (App. 224-25, 228, 231, 233).

On appeal, the United States Court of Appeals for the Third Circuit (Judge Adams concurring and dissenting[3]) affirmed various findings of violations of the Act and Rule 10b-5, including, *inter alia*, inadequate disclosure of the "unique" benefits AMAX was to obtain incident to the amalgamation; creation of a false impression that the AMAX-RST amalgamation was a necessary consequence of nationalization of certain of the RST assets;[4] failure to disclose that externalization of RST assets from Zambia was discretionary under the nationalization agreement with that government and need not have been accomplished simultaneously thereunder with nationalization; and failure to adequately disclose that RST's banking advisors did not make an independent survey of RST's assets, but rather relied solely upon information supplied by the RST management. The Court of Appeals found the violations to be material and affirmed the equitable relief ordered below (App. 24).[5]

The Court of Appeals reversed the District Court's order for further hearings on relief and denied a cross-appeal by petitioners requesting an award of damages on the existing record (App. 25).[6] It did so entirely on the

3. Judge Adams would have dismissed the complaint, holding that no violations of law had been established.

4. Prior to the merger proposal of AMAX, Zambia passed legislation authorizing the purchase of 51% of the interest in the copper mines located in that country, many of which were substantially owned by RST. The Court of Appeals sustained the District Court's finding that the presentation to the shareholders of the amalgamation and nationalization plans as a unitary proposal in which they could not approve one while rejecting the other was a manipulative scheme to coerce shareholder approval of the former plan. The Court of Appeals held that it was a material violation not to have disclosed the alleged compelling business reasons for presenting the proposals in one package.

5. Argument before the Court of Appeals was held on April 20, 1971. The decision was rendered on March 31, 1972.

6. Subsequent to the argument before the Court of Appeals, petitioners moved to supplement the record to include a prospectus of Botswana RST Limited (Botswana RST) dated March 30, 1968,

ground that damages were barred by the finding of the Zambian court that the amalgamation was fair, resting its decision on the principle of comity, despite a specific finding by the District Court that, "The amalgamation is unfair to the non-AMAX shareholders." 322 F. Supp. at 1365 (App. 225).[7]

---

6. (Cont'd.)

filed under the Securities Act of 1933 and attached as an exhibit to Form 20K of the Securities Exchange Commission (Commission) filed by Botswana RST pursuant to the Act. That prospectus, which was not produced by respondents in discovery in this case, was obtained from the Commission in another case pending in the Eastern District of Pennsylvania. That prospectus stated that legal counsel for Botswana RST—who are also legal counsel in Zambia for RST—advised that there is doubt as to the enforceability in Zambia of judgments of United States courts based upon the 1933 Act, which includes certain anti-fraud provisions substantially the same as those found in Section 10(b) of the 1934 Act. Petitioners alleged that the only evidence of reciprocal recognition of judgments of United States courts by Zambia, offered in the District Court, was an unqualified and unsubstantiated opinion by this same firm of solicitors to the effect that, "had an American court entered a judgment having conclusive effect in the United States, the courts of Zambia would accord to that judgment the same effect in Zambia." The two statements of Ellis & Co., which represented RST in the Zambian amalgamation, were alleged to be substantially contradictory. The motion to supplement the record was denied without opinion.

7. But for the stay granted on August 13, 1970 by the Court of Appeals, permitting respondent RST to seek confirmation by the Zambian Court, the issue of the effect of the Zambian decree would not have arisen.

REASONS FOR GRANTING THE WRIT.

Comity Should Not Have Been Applied to Bar Damages for Violation of the Securities Exchange Act of 1934 Through Application of a Mixed Finding of Law and Fact Derived From a Foreign, Non-Adversary Proceeding.

The decision of the Court of Appeals for the Third Circuit in its practical impact will tend to limit the right to a full hearing and a full remedy for literally millions of United States stockholders of foreign corporations. It raises issues crucial to the administration of the federal securities laws, intended for the protection of investors in securities traded in this country of any corporation, wherever incorporated. The decision in this case precluded the award of damages on the basis of a finding of fairness by a foreign tribunal having no jurisdiction over violations of the federal securities laws and no jurisdiction over the United States shareholders who were victims of those violations.

The Court of Appeals stated that:

> "Insofar as the Rule violations are concerned we are convinced that the District Court was not free to ignore the Zambian decree. The decree involved the conduct of a Zambian corporation. It was entered by judicial action pursuant to statutory authority after a hearing on due notice. In these circumstances the District Court could not look behind the decree even at the behest of American security holders. Canada Southern Ry. v. Gebhard, 109 U. S. 527 (1883). . . .
>
> Consequently, we conclude that the District Court was in error to the extent it determined that damages should be awarded on the basis of its finding that the amalgamation was unfair." (App. 23-4)

(a) Canada Southern R. R. v. Gebhard Is Not Determinative and Its Relation to Later Legislation Should Be Clarified.

The principles of *Canada Southern R. R. v. Gebhard*, 109 U. S. 527 (1883), the sole authority cited by the majority of the Court of Appeals for its holding that the Zambian decree must be given conclusive effect on the question of damage relief, are plainly inapplicable. That decision predates the Securities Exchange Act of 1934, which bears an explicit Congressional determination that security holders in the United States are entitled to protection from deceptive and fraudulent acts in connection with the purchase and sale of securities traded in the United States of any corporation, wherever incorporated.[8] The Court of Appeals did not doubt the applicability of the Act to the transactions and communications in suit.

Nevertheless, on the question of damages, the Court of Appeals decreed itself bound by the rationale of *Gebhard*, that, "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation . . . . as the known and established policy of that government authorizes. To all intents and purposes he submits his contract with the corporation to such a policy of the foreign government. . . ."

That rationale has no validity in dealing with rights arising under the federal securities laws. Since enactment of those laws, fifty years after *Gebhard*, if a corporation wishes to do business ". . . through the use of the mails

8. The Preamble to the Securities Exchange Act describes it as an Act:

"To provide for the regulation of . . . over-the-counter markets operating in *interstate and foreign commerce and through the mails*, [and] to prevent inequitable and unfair practices on such . . . markets, and for other purposes." 48 Stat. 881 (emphasis supplied)

and facilities of interstate commerce, it must be willing to comply fully with United States law. If not, it is up to [the corporation] to determine where it wants to do business". *Fontaine v. Securities and Exchange Commission*, 259 F. Supp. 880, 891 (D. P. R. 1966). See also, *Schoenbaum v. Firstbrook*, 405 F. 2d 200, 206, affirmed in part, reversed in part on other grounds, 405 F. 2d 215 (2d Cir. 1968, *en banc*), *cert. den. sub nom., Manley v. Schoenbaum*, 395 U. S. 906 (1969).

Apart from the overriding policy of the federal securities laws, the reorganization awarded recognition in *Canada Southern R. R. v. Gebhard, supra*, was a proceeding in bankruptcy, falling within a well recognized exception to the requirement of personal jurisdiction. The opinion of this Court laid great stress upon that factor, as follows:

> "In fact such 'arrangement acts' are a species of bankrupt Acts. Their object is to enable corporations created for the good of the public to relieve themselves from financial embarrassment by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated.
>
> * * *
>
> "The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy. . . . Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. . . .

> Bankrupt laws, whatever may be the form they assume, are of that character."

The situation presented here is entirely different, where the effect of the holding of the Court of Appeals is to cut off rights under federal statutes having no counterpart in the law of Zambia. It is a holding which undermines the effectiveness of United States laws, encouraging wrongdoers who violate those laws to seek the sanctuary of a foreign court to insulate them from the consequences of their acts in the United States.

As stated in Goodrich, *Handbook of the Conflict of Laws* (3d Ed. 1949):

> "Legislative provisions for rendering judgment against absent non-consenting foreigners upon claims of citizens of the forum are not uncommon, especially in countries whose legal system differs from our own. A legislature not restrained by constitutional provisions may pass such a statute if it pleases, and the courts there must give effect to it. But the presence of such a statute on the local statute book does not entitle a judgment of a foreign court, rendered under such circumstances, to recognition.
>
> * * *
>
> "The invalidity of the personal judgment rendered against the non-resident, nonconsenting absentee does not rest alone upon his lack of notice of the litigation and opportunity to defend. These requirements must indeed be met to comply with what we may call procedural due process of law, even where there is jurisdiction, as will appear hereafter. But a state cannot enlarge its jurisdiction by service of process outside its borders, no matter how efficacious the notice in giving

knowledge of pending litigation. If there is no jurisdiction over the defendant, the service of notice outside the state will not give validity to the judgment. The defect is one of power to create an obligation through the court's action." (at 185-87)

The extraterritorial effect of orders purporting to bind parties outside the forum is traditionally less honored, through comity, outside the forum than within it.[9] Thus it was stated by the Court of Queens Bench in the case of *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 158-60 (1870) that:

> "Should a foreigner be sued under the provisions of the statute referred to [Common Law Procedure Act, 1852, ss. 18 and 19], and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing of foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction

---

9. Petitioners also deny that the Zambian companies ordinance, under which the amalgamation was effected, does in fact purport or intend to estop collateral litigation by shareholders or creditors beyond the personal jurisdiction of the Zambian Courts. *See New Zealand Loan and Mercantile Agency Company, Ltd. v. Morrison*, (1898) A. C. 349, P. C.; *Cf., SEC v. National Securities, Inc.*, 393 U. S. 453, 463 (1969).

thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

* * *

"The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No." (at 158-60).

See also, *Emanuel v. Symon*, (1908) 1 K. B. 302, C. A.

A fortiori, the answer should be "no", where there is no personal jurisdiction in the foreign court, and effective enforcement of a federal statute, expressly intended to protect investors in the United States, is at stake.

The petitioners in this action were not domiciliaries of Zambia, were not in that nation at the time of the reorganization proceedings, performed no act in Zambia, and purchased their shares through independent stock exchanges and brokerage houses located in the United States. The Zambian decree should not, in terms of due process, or a sound policy of comity, have been afforded any collateral effect against them. *Hilton v. Guyot*, 159 U. S. 113, 202-03 (1895); *Hanson v. Denckla*, 357 U. S. 235 (1958); *Rachal v. Hill*, 435 F. 2d 59 (5th Cir. 1970), *cert. den.* 403 U. S. 904 (1971).

In *Kane v. Central American Mining & Oil, Inc.*, 235 F. Supp. 559 (S. D. N. Y. 1964), the defendants argued that

claims under the Act should be dismissed on the basis of estoppel founded on the judgment of a Panama court. Judge Weinfeld held that the plaintiffs were neither parties nor privies of parties to that foreign litigation and, therefore, were not bound by its results:

> "Defendants' argument that plaintiffs in this action, as shareholders, are privies . . . is without merit. Any other result would permit a corporation to immunize itself from derivative suits by the expedient of engaging in collusive litigation designed to raise questions which shareholders may later wish to press." (at 568, n. 36)

Petitioners submit that the Third Circuit misconceived the reach of this Court's decision in *Canada Southern R. R. v. Gebhard*. Its extension to insulate wrongdoers in the United States from the full consequences of their violations of the Securities Exchange Act is unwarranted, posing a serious threat to full and effective enforcement of that law.

(b) The Zambian Decree Should Not Have Been Applied To Bar Recovery From AMAX.

Without explanation, the Court of Appeals barred recovery of damages from AMAX on the basis of the Zambian decree. AMAX, like the petitioners, was not a party to the Zambian proceeding. It was found by the District Court, as well as the Court of Appeals, to be a party to the violations of the Act. Whatever consequences attended the Zambian decree, they should not have been extended for the benefit of AMAX, which was not itself a party before the court in Zambia. See, *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955).

(c) The Court Should Affirm the Continued Vitality of Charles T. Cromwell v. County of Sac in Support of the Integrity of the Securities Exchange Act.

Collateral estoppel applies only to issues actually litigated. It does not reach issues which merely could have or "should" have been litigated. *Restatement of the Law of Judgments*, § 68, Comment D. This principle was long ago and logically extended to the proposition that a default judgment is of no effect for purposes of collateral estoppel. *Charles T. Cromwell v. County of Sac*, 94 U. S. 351, 356 (1877); *Restatement of the Law of Judgments*, § 68, Comment F; 1B Moore, *Federal Practice*, ¶0.444[2]. The Third Circuit has without analysis or comment adopted a contrary view in this case, denying petitioners the right to recover damages, solely on the basis of proceedings before a Zambian court, which, as to petitioners, stand on no different footing from that of a judgment by default. Affirmation of the principle of *Charles T. Cromwell v. County of Sac* is of paramount importance to the protection of Securities Exchange Act rights granted by Congress, over which exclusive jurisdiction is in the federal courts. Persons who wish to preserve their rights under the Act, including their right to a federal forum,[10] should not be estopped by matters of fact or law determined by non-federal courts before which they did not actually litigate.

(d) Collateral Estoppel in Cases Under the Securities Exchange Act Should Not Extend to Mixed Findings of Law and Fact.

The Third Circuit barred the award of damages through recognition of a finding of the Zambian court that

10. 15 U. S. C. § 78aa.

the amalgamation was "fair". This is unquestionably a mixed finding of fact and law. The decision conflicts with decisions of the Second Circuit, as well as with the policy of exclusive federal jurisdiction under the Securities Exchange Act.

Exclusive jurisdiction under the Act rests with the federal courts, and no state or foreign court may adjudicate any matters of law arising thereunder. 15 U. S. C. § 78aa. *SEC v. National Securities, Inc.*, 393 U. S. 453, 461-63 (1969); *Kane v. Central American Mining & Oil, Inc.*, 235 F. Supp. 559, 568 (S. D. N. Y. 1964); *McCollum v. Billings*, 53 Misc. 2d 661, 279 N. Y. S. 2d 609 (1967); *Levine v Silverman*, 43 Misc. 2d 415, 251 N. Y. S. 2d 68 (1954); *American Distilling Co. v. Brown*, 295 N. Y. 36, 64 N. E. 2d 347, 348-49 (1945); *Investment Associates, Inc. v. Standard Power & Light Corp.*, 29 Del. Ch. 225, 48 A. 2d 501 (1946), aff'd. 51 A. 2d 572 (1947). Cf., *Rachal v. Hill*, 435 F. 2d 59 (5th Cir. 1970), *cert. den.* 403 U. S. 904 (1971).

Jealous regard for the exercise of that jurisdiction has been an essential element in developing a body of uniform federal fiduciary law for the protection of investors in the United States. See, *Superintendent of Insurance of New York v. Bankers Life and Casualty Co.*, 404 U. S. 6, 12-3 (1971); *Affiliated Ute Citizens of Utah v. United States*, — U. S. —, 31 L. Ed. 2d 741 (1972); *Drachman v. Harvey*, 453 F. 2d 722, 727-29 (2d Cir. 1972); *McClure v. Borne Chemical Co.*, 292 F. 2d 824, 834 (3rd Cir.), *cert. den.*, 368 U. S. 939 (1961). Assertion of these substantive rights is facilitated by procedural advantages available under Section 27 of the Act [11] and the Federal Rules of Civil Procedure.[12] The

11. 15 U. S. C. § 78aa (Service, venue and jurisdiction).

12. There is no provision under Zambian law for a shareholder to compel discovery and present documentary evidence, as was presented to the District Court. Thus petitioners could not have compelled RST or AMAX, even if the latter had been party to the Zambian proceedings, to produce the documents ultimately produced here.

policies underlying the statutory grant of exclusivity are undermined by according a collateral estoppel effect on mixed issues of law and fact to the decree of a Zambian court which had no power or competence to deal with claims arising under the Act.

In contrast, in *Vernitron Corporation v. Benjamin*, 440 F. 2d 105, 108 (2d Cir.), *cert. den.*, 402 U. S. 987 (1971), the Second Circuit, while observing that "[t]here is no reason why the state court cannot or should not determine issues of fact and state law . . . as they come up in state litigation", went on to say that ". . . . The only conceivable interference here would be an attempt by the state court to determine issues of federal law, a task which it certainly has not as yet undertaken and which in any event would be wholly without effect."[13] Similarly, Judge Mansfield stated in *Movielab, Inc. v. Berkey Photo, Inc., et al.*, 321 F. Supp. 806, 810 (S. D. N. Y. 1970), aff'd. on other grounds, 452 F. 2d 662 (2d Cir. 1971), that ". . . assuming that the alleged Exchange Act violations could be adjudicated by the state court as defenses to Berkey's suit there, that adjudication could at most operate as a collateral estoppel to the extent of any specific findings of fact." Judge Mansfield also noted that, "To the extent that common law fraud might be asserted as an affirmative defense in the state court suit, its elements would differ from those of a claim based upon violation of § 10(b). Claims arising under the Securities Act, for example, do not require the same degree of intent to defraud or the justification for reliance found in common law fraud." 321 F. Supp. at 810, n. 2.

---

13. The case of *Abramson v. Pennwood Investment Corp.*, 392 F. 2d 759 (2d Cir. 1968) is patently distinguishable. There the court did not estop a Section 10(b) finding upon the basis of a state court determination of fairness, but only ruled that a settlement of both state and federal claims could be enforced because the fairness of the *settlement* had been adjudicated in a prior state proceeding. There was no estoppel as to the fairness of the transaction in suit.

Judge Mansfield's remarks, of course draw attention to an additional complementary policy and rationale requiring the limitation of collateral estoppel to issues of fact, so as to protect jurisdiction and litigants under the 1934 Act. The determination of law implicit in a state or foreign mixed finding of law and fact may not be consistent with the uniform federal law that is to prevail.

This court, in *J. I. Case Co. v. Borak*, 377 U. S. 426, 433 (1964), stated that:

> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942):
>
> > 'When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. . . .'"

Here, the Third Circuit has in effect applied collateral estoppel to a mixed finding of law and fact that the merger at issue was "fair". The Zambian court did not in any manner indicate the meaning of this term or the legal standard it utilized in reaching its conclusion. A mixed finding should, at the very least, not be collaterally applied where the implicit standards of law applied have not been shown to be identical or substantially identical to those properly applied under the Act. A silent record should and must not suffice. See *Russell v. Place*, 94 U. S. 606, 608-09 (1876); 1B Moore, *Federal Practice*, ¶ 0.443[4], at 3915.

The potential for deviation in standards is shown by two examples in this case. The District Court determined that, "the burden of proving the fairness of the amalgamation is on defendants and they have failed to sustain that burden". 322 F. Supp at 1365 (App. 225).[14] The defendants-respondents, unable to cite any Zambian case defining the standard of fairness in this area, cited in the Court of Appeals the English case of *Carruth v. Imperial Chemical Industries, Ltd.* (1937) A. C. 707 (H. L.), as authority. In that case, Lord Maugham stated that:

> "[I]n the first place I will repeat that the onus is on those who say the scheme, so far as alteration of rights is concerned, is unfair; the deferred shareholders have consented to it under Art. 71, and those who contend that the interests of the minority are being unfairly overriden by persons with other and conflicting interest, must prove it. A passage from Buckley on the Companies Acts (11th Ed., p. 121) is no doubt a correct statement:
>
> > 'Where the memorandum or articles contain a clause empowering a specified majority of the holders of any class of shares to sanction modifications of the rights of the shares of that class, any scheme for reduction which is sanctioned in accordance with such clause by the classes affected thereby is prima facie a reduction in accordance with the legal rights of the shareholders.' "

The Zambian court may have considered an amalgamation *prima facie* fair. But the Court of Appeals has here

14. The District Court also determined that "even if the burden of proof were on the [named] plaintiff, he has met his burden of proving unfairness". 322 F. Supp. at 1365 (App. 225).

upheld findings of material violations of Section 10(b) of the Act, including, *inter alia*, a finding of "inadequate disclosure of the unique benefits AMAX was to obtain incident to the amalgamation." (App. 15) In the context of such a finding, it is implausible that the federal standard for determination of damages in this case should likewise encompass a *prima facie* presumption of fairness in the terms of the merger.

The Third Circuit has applied to bar damages under the Act, a foreign judgment which may, according to *Carruth* cited by the respondents, be based upon a presumption of fairness. Utilization of this presumption would be of considerable significance to the outcome of a proceeding, such as that actually held in Zambia, in which no one argued against the amalgamation. As the District Court noted in declining to give collateral effect to the Zambian decree, "The proceedings before the High Court of Zambia [the Zambian trial court] . . . were not in fact adversary . . . ." 322 F. Supp. at 1351 (App. 195).

The District Court also stated that "the High Court's Order does not indicate any consideration of the grave questions of . . . valuation discussed in this opinion". 322 F. Supp. at 1351 (App. 195-96). These questions of valuation indicate a second area in which the Zambian standard of law for determination of fairness may have differed from that under the Act.

The Court of Appeals stated that:

> "The District Court found that the benefits AMAX was to obtain as a result of the amalgamation were inadequately disclosed to the RST shareholders. In view of the close ties between AMAX and RST we agree that such disclosure would have been particularly important. The benefits accruing to AMAX included:

(1) an increase of $7 million in annual income; (2) an improvement of $134 million in cash-flow during the period 1970 to 1975; (3) an improvement of $191 million in the corporation's balance of payments; and (4) the acquisition of high-yielding assets. We think the District Court was justified in concluding that the piecemeal presentation of these benefits scattered throughout the proxy materials and the appendices was inadequate disclosure under the securities laws." (App. 15)

Implicit in this determination of the Court of Appeals, and explicit in the determinations of the District Court, is the fact that AMAX did indeed obtain unique and substantial benefits through the amalgamation.[15] Pursuant to federal decisions, a wrongdoer must ". . . disgorge his fraudulent enrichment". *Janigan v. Taylor*, 344 F. 2d 781, 786 (1st Cir.), *cert. den.*, 382 U. S. 879 (1965). Under federal law the "unique" and undisclosed benefits to AMAX would be taken into account in fixing damages.

The Zambian court may have believed that fairness constituted a price which the RST assets would command on the open market. A federal court might, to the contrary, hold that had RST shareholders known of the special value to AMAX of the RST assets, they might have insisted upon a share of this premium, and that this benefit to AMAX, or a portion thereof, should be accrued as an element of damages. It might again be held that ". . . it is simple equity that a wrongdoer should disgorge his fraudulent enrichment", as damages. *Janigan v. Taylor, supra.* As

15. "The directors of AMAX were able . . . to drive a hard bargain to wash out the public stockholders as cheaply as possible, while securing for AMAX unique high-yielding assets." 322 F. Supp. at 1353. (App. 198-99).

this Court recently held in *Affiliated Ute Citizens of Utah v. United States*, — U. S. —, 31 L. Ed. at 762 (1972):

> "[T]he correct measure of damages under § 28 of the Act, 15 U. S. C. § 78bb(a) is the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct . . . except for the situation where the defendant received more than the seller's actual loss. In the latter case damages are the amount of the defendant's profit."

The legal standards utilized by the Zambian court in its determination of fairness were not shown to be identical or substantially identical to the legal standards utilized in the determination of damages under the Act. The Court of Appeals did not compare these standards or contend that they were identical, or substantially identical.

The use of collateral estoppel based upon such a mixed finding of law and fact should at the very least be rejected absent an examination and a definite determination of identity between standards. As such determinations will often entail uncertain or complex assessments of foreign law, a clear test is urged upon this Court, which should decisively approve the rule of the Second Circuit barring the collateral use of non-federal findings of law, inherent in mixed findings of law and fact, in Securities Exchange Act cases and reject the Third Circuit's sanctioning of the use of standards of foreign law in securities litigation. This Court is urged to do so for the preservation of the integrity of the federal securities laws and the protection of investors those laws are intended to protect.[16]

---

16. *See* White, Note: *The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934*, 46 N. Y. U. L. Rev. 936, 966-68 (1971).

CONCLUSION.

For the foregoing reasons in support of the effective administration of the Securities Exchange Act of 1934 and for the protection of investors thereunder, this writ should be granted.

Respectfully Submitted,

HAROLD E. KOHN,
AARON M. FINE,
STUART H. SAVETT,
ARTHUR M. KAPLAN,
Suite 1214 IVB Building,
1700 Market Street,
Philadelphia, Pa. 19103,
Attorneys for Petitioners.

Of Counsel:

HERBERT E. MILSTEIN,
1776 "K" Street, N. W.,
Washington, D. C. 20006

June 29, 1972.

E COPY

72-5

Supreme Court, U. S.
FILED
JUN 29 1972
JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. .

HAROLD E. KOHN, Trustee, et. al.,
Petitioners,

v.

AMERICAN METAL CLIMAX, INC. and
ROAN SELECTION TRUST LIMITED,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Volume 2.

HAROLD E. KOHN,
AARON M. FINE,
STUART H. SAVETT,
ARTHUR M. KAPLAN,
Suite 1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
Attorneys for Petitioners.

Of Counsel:
HERBERT E. MILSTEIN,
1776 "K" Street, N.W.
Washington, D. C.

June 29, 1972.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

TABLE OF CONTENTS OF APPENDIX.

Vol. 1
Page

A. Opinion of the United States Court of Appeals for the Third Circuit dated March 31, 1972 1

Vol. 2
Page

B. Judgment of the Court of Appeals for the Third Circuit dated March 31, 1972 111

C. Order of the United States Court of Appeals for the Third Circuit dated April 17, 1972 113

D. Order of the United States Court of Appeals for the Third Circuit dated April 27, 1972 116

E. Findings of Fact, Conclusions of Law, Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dated June 8, 1970 117

F. Order of the United States District Court for the Eastern District of Pennsylvania dated August 12, 1970 142

G. Order of the United States Court of Appeals for the Third Circuit dated August 13, 1970 146

H. Findings of Fact, Opinion, Conclusions of Law and Order of the United States District Court for the Eastern District of Pennsylvania dated November 25, 1970 155

I. Opinion and Order of the United States District Court for the Eastern District of Pennsylvania dated January 15, 1971 227

J. Order of the United States District Court for the Eastern District of Pennsylvania dated January 16, 1971 234

K. Order of the United States District Court for the Eastern District of Pennsylvania dated January 18, 1971 237

L. Order of the High Court for Zambia dated August 14, 1970 246

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 19175/19176, 19537/19538, 71-1099, 71-1100 and 71-1101.

HAROLD E. KOHN, TRUSTEE,
Intervene Parties Plaintiffs, 13, 31, 34, 38, 41

v.

AMERICAN METAL CLIMAX, INC., AND ROAN SELECTION TRUST, LIMITED, N. R. ROTHSCHILD & SONS, KUHN, LOEB & CO., LEHMAN BROTHERS, RONALD L. PRAIN, JEAN VUILLEQUEZ, JAMES L. REID, DONALD J. DONAHUE, ERIC J. GOUDIE, H. J. HINVES, HAROLD K. HOCHSCHILD, IAN MacGREGOR, ROBERT H. PAGE, JOHN PAYNE, JR., H. J. WEDGWOOD, E. C. WHARTON-TIGAR

AMERICAN METAL CLIMAX, INC.,
Appellant in Nos. 19,175, 19,537, and 71-1099,

ROAN SELECTION TRUST, LIMITED,
Appellant in Nos. 19,176, 19,538 and 71-1100,

HAROLD E. KOHN, TRUSTEE, ET AL.,
Appellant in No. 71-1101.

(D. C. Civil Action No. 70-933).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and ADAMS and ROSENN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, from which appeals No. 19537 and 19538 were taken, which order was filed November 25, 1970, and the order from which appeals No. 71-1099 and 71-1100 was taken, which order was filed on January 15, 1971 and subsequently amended on January 16, 1971 and January 18, 1971, be, and the same are hereby affirmed except as modified by the opinion of this Court.

It is Further Ordered and Adjudged by this Court that the appeals at Nos. 19175 and 19176 be and the same are hereby dismissed as moot, with costs in these appeals taxed against appellants, and

It is Further Ordered and Adjudged by this Court that the appeal at No. 71-1101 be and the same is hereby dismissed, with costs in this appeal taxed against appellant.

ATTEST:

THOMAS F. QUINN,
Clerk.

March 31, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos: 19,175, 19,176, 19,537, 19,538, 71-1099
71-1100, and 71-1101.

HAROLD E. KOHN, TRUSTEE, ET AL.,

v.

AMERICAN METAL CLIMAX, INC., ET AL.,

AMERICAN METAL CLIMAX, INC., ET AL.,
Appellants in 19,175, 19,537, 71-1099,

ROAN SELECTION TRUST, LIMITED,
Appellant in 19,176, 19,538, 71-1100,

HAROLD E. KOHN, TRUSTEE, ET AL.,
Appellant in 71-1101.

PRESENT: SEITZ, ADAMS and ROSENN, *Circuit Judges.*

ORDER.

It is ORDERED that the concurring and dissenting opinion heretofore filed in the above be and the same is amended as follows:

1. Delete from Page 27, line 5 of the second full paragraph: "Rhodesian" and add in its place: "Rhodesia".

2. Delete from Page 27, line 6 of the second full paragraph: "Federation".

3. Delete from page 32, line 12: "$100,000" and add in its place: "$100,000,000".

4. Delete from page 32, line 17: "$500,000,000" and add in its place: "$50,000,000".

5. Add to page 34, line 26, after the word "call" but before the comma the following: "to the trial judge, who was in Florida".

6. Delete from page 40, lines 15 and 16 the following: "B. Elements of a Private Action Involving Money Damages Under § 10b and Rule 10b-5" and add in its place the following: "B. Elements of a Private Action Involving Money Damages or Injunctive Relief Under Section 10b or Rule 10(b)-5".

7. Add the following to page 42, footnote 29, last line: "*See also,* Fershtman v. Schectman, 450 F. 2d 1357, 1360 (2d Cir. 1971); Review 71 v. Alloys Unlimited, Inc., 450 F. 2d 482, 485 (10th Cir. 1971); Levine v. Seilon, 439 F. 2d 328, 332 (2d Cir. 1971)."

8. Delete from page 45, line 9, the word: "The" and add in its place: "This" so that the line reads: "to this opinion . . .".

9. And the following sentence to page 50, last line: "*But see* Review 71 v. Alloys Unlimited, Inc., 450 F. 2d 482 (10th Cir. 1972)."

10. Delete from page 53, line 12: "nonetheless".

11. Add the following sentences to page 54, line 18: "In Drachman v. Harvey, 453 F. 2d 722 (2d Cir. 1972) (en banc), the court, reversing the affirmance of the dismissal of a complaint, held that a 'sufficient claim is stated of fraud. . . .' *Id.* at 737 (emphasis added). *See also* Movielab, Inc. v. Berkey Photo, Inc., 452 F. 2d 662 (2d Cir. 1971); Fershtman v. Schectman, 450 F. 2d 1357, 1361 (2d Cir. 1971); Levine v. Seilon, 439 F. 2d 328 (2d Cir. 1971)."

12. Delete from page 59, line 4, the following: ", *supra.*" and add a period after the number 13.

13. Add to page 59, line 26, after "Fed. R. Civ. P.," the following: "governing class actions,".

14. Add to page 60, footnote 46 the following: "The Second Circuit recently reversed this determination by the district court, but did not disapprove the use of such forms. CCH FED. SEC. L. REP. ¶ 93,397 (2d Cir. 1972)."

15. Add the following to page 62, line 18 between "*See*" and "Chasins"; "Gottlieb v. Sandia American Corporation, 452 F. 2d 510, 516 (3d Cir. 1971);".

16. Delete from page 63, line 15, the word: "negative" and add in its place the word: "affirmative".

17. Delete from page 64, line 6 the symbol: "§" and add in its place the word: "Section".

18. Delete from page 80, line 16, the words: "pay damages" and add in their place: "respond".

19. Delete from page 83, line 11, the word: "damages" and add in its place: "relief".

20. Delete the period from the last line of the first full paragraph on page 87 and add the following: ", *cert. denied,* U. S. (1972)."

21. Delete from page 104, on lines 1 and 2 of the last paragraph the words: "respectfully dissent from the majority and".

ARLIN M. ADAMS
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19,175, 19,176, 19,537, 19,538,
71-1099, 71-1100.

HAROLD E. KOHN, TRUSTEE, ET AL.

v.

AMERICAN METAL CLIMAX, INC., ET AL.,

AMERICAN METAL CLIMAX, INC., ET AL.,
Appellants in 19,175, 19,537, 71-1099,

ROAN SELECTION TRUST, LIMITED,
Appellant in 19,176, 19,538, 71-1100.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by Defendants-Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

COLLINS J. SEITZ,

Judge.

Dated: April 27, 1972.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CLASS ACTION
CIVIL ACTION No. 70-933

HAROLD E. KOHN, TRUSTEE,
Plaintiff.

v.

AMERICAN METAL CLIMAX, INC.
and
ROAN SELECTION TRUST, LIMITED,
Defendants.

MASTERSON, *J.*

June 8, 1970

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER.

I. FINDINGS OF FACT.

A. *Nature of Action and Jurisdiction.*

1. This is an action brought in three counts by plaintiff, Harold E. Kohn, trustee for the Pension of Harold E. Kohn, P. A., attorneys-at-law, against defendants, American Metal Climax, Inc., (AMAX) and Roan Selection Trust, Ltd., (RST). It is brought both as a derivative action on behalf of RST and as a class action on behalf of all shareholders of RST, except AMAX, and principally seeks to enjoin AMAX from acquiring some of the assets of RST remaining after the acquisition of control of RST by the Government of Zambia.

2. Count I is brought under section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78j, and Rule 10b-5, 17 C. F. R. § 240.10b-5. In substance, it charges that AMAX conspired with one or more of the directors of RST to perpetrate a fraud on the non-AMAX shareholders of RST and that pursuant to this conspiracy AMAX made untrue statements of material fact and omitted to state other material facts necessary to be stated in order to make the statements made not misleading.

3. Count II charges AMAX with the above-mentioned fraud and with a breach of fiduciary duty owed to RST and its non-AMAX shareholders.

4. Count III is brought only as a derivative action on behalf of RST. It charges that the proposed acquisition of RST by AMAX is violative of Section 7 of the Clayton Act, 15 U. S. C. § 18, and that an alleged interlocking of directorates between AMAX and RST is violative of Section 8 of the Clayton Act, 15 U. S. C. § 19.

5. The Court has subject-matter jurisdiction over Count I under section 27 of the Securities and Exchange Act of 1934, as amended, 15 U. S. C. § 78aa.

6. The Court has subject-matter jurisdiction over Count II under 28 U. S. C. § 1332.

7. The Court has subject-matter jurisdiction over Count III under 15 U. S. C. § 26.

8. Venue is proper in this District under section 27 of the Securities and Exchange Act of 1934, as amended, 15 U. S. C. § 78aa, and under 28 U. S. C. § 1391(c) and (d), § 1401.

9. This Court has personal jurisdiction over the defendants.

B. *Principals Involved.*

10. Plaintiff, Harold E. Kohn, Trustee, for the Pension Plan of Harold E. Kohn, P. A., Attorneys-at-law, holds American depositary receipts representing 2,000 ordinary shares of Roan Selection Trust, Ltd., (RST) which are listed for trading on the New York Stock Exchange. Plaintiff is a citizen of the Commonwealth of Pennsylvania, resides in the Eastern District of Pennsylvania, and purchased such American depositary receipts on January 14, 1970. (Uncontested Fact No. 1).

11. There are approximately 40,000 shareholders of RST in the United States (see Uncontested Fact No. 10) and United States citizens, other than AMAX, own approximately 37.7% of RST. (Uncontested Facts Nos. 5 and 9).

12. Defendant, American Metal Climax, Inc. (AMAX), a listed company on the New York Stock Exchange, is a New York corporation with its principal place of business at 1270 Avenue of the Americas, New York, New York, and is licensed to do business in the Commonwealth of Pennsylvania. (Uncontested Fact No. 2). AMAX is a major producer, fabricator and marketer of metals and minerals. AMAX is the owner of 42.3% of the issued shares of RST. (Uncontested Fact No. 5, in part).

13. Defendant RST is a corporation organized and existing under the laws of the Republic of Zambia, with its principal place of business in Zambia. RST's executive office is located at Kafue House, Cairo Road, Lusaka, Zambia; its central and registered office is located at Mpelembe House, Broadway, Ndola, Zambia. RST, since at least 1955, has reported annually to the Securities and Exchange Commission (SEC) on Form 20-K with its Annual Report

to Shareholders annexed. Its principal business is the production, smelting and refining of copper in Zambia. (Uncontested Fact No. 3).

14. The Morgan Guaranty Trust Company of New York (Morgan), the American depositary of RST shares, regularly performs the following functions:

(a) mails annual quarterly reports supplied to it by RST to registered American shareholders of RST (Deposition of Regis E. Moxley, Vice-President of Morgan, p. 6);

(b) distribates cash dividends of RST to American shareholders (Moxley Dep., p. 8);

(c) mails other reports, announcements, documents and circulars of RST to American shareholders (Moxley, Dep., pp. 10-13).

In performing these services, Morgan is paid by RST. The fees paid Morgan by RST for these and other services amounted to over $300,000 for the period July 1, 1968, to June 30, 1969. (Plaintiff's Exhibit, hereinafter "PX", No. 22).

15. At all times material to this action, RST had 13 directors, six of whom were and are directors of AMAX; of the six common directors, three are present and two are former officers of AMAX; the other seven directors of RST, including the Chairman, Executive Vice-Chairman and the President of RST, are neither directors nor officers of AMAX. (Uncontested Fact No. 5, in part).

C. Nationalization of RST.

16. In the spring of 1968, the Zambian Government announced a limitation of dividends that may be paid outside the country to 50% of net profit. This is commonly

referred to as the Mulinguishi Declaration. (Uncontested Fact No. 7).

17. On August 11, 1969, the President of Zambia announced ("Matero Declaration") the desire of the Zambian Government to acquire controlling equity interests in the operating copper properties in Zambia. Thereafter, RST was invited by the Government to negotiate the sale of 51% interest in the copper producing, smelting and refining businesses conducted in Zambia by certain of its operating subsidiaries. Under the circumstances, the Board of RST entered into negotiations with the Government. (Uncontested Fact No. 8, in part).

18. Negotiations with the Zambian Government were conducted on behalf of RST by Messrs. Vuillequez and R. H. Page, RST's Executive Vice-Chairman and Chief Financial Officer, respectively. AMAX did not take part in the negotiations between RST and the Government of Zambia, but was kept advised of the progress of such negotiations by RST, supplied technical assistance to RST in the drafting of proposals, advised RST of its views as to certain of the issues, and made known to RST, prior to execution of the agreement, its opinion that the agreement was as favorable to RST as could be expected under the circumstances. (Uncontested Fact No. 12).

19. On November 17, 1969, the RST board met and unanimously approved an agreement in principle to be entered into between the Government, the Industrial Development Corporation of Zambia, Ltd. (INDECO) (a Government corporation) and RST. The Board also unanimously approved a statement to be issued by Sir Ronald Prain, Chairman of the Board of RST, dated November 17, 1969. At the meeting, Vuillequez recorded his appreciation of the RST negotiating team for the cooperation

of AMAX during the negotiations with the Government. Also at that meeting, the following statement was made by F. Taylor Ostrander and R. J. Wright, both alternate directors of RST and employees of AMAX, on behalf of AMAX:

> As with any negotiation, we are sure there have been ups and downs, there are matters of satisfaction and of disappointment.
>
> Now we have before us a negotiated package deal, of greater complexity, that has received the approval of the President [of Zambia] and the ratification of his cabinet. The major details of this package deal were approved in principle by the AMAX Board on November 6, subject to satisfactory agreement on externalization.
>
> On the whole, we feel that shareholders have come out of the matter not too badly.
>
> On behalf of our principals and for AMAX as a whole, we particularly want to express our appreciation for the difficult negotiating job so successfully completed by your negotiating team, and for the effective leadership and support that was provided by the whole RST organization.

The minutes of the AMAX board contain no reference to any approval of the agreement reached between RST and Zambia. Mr. Ian MacGregor, who is Chief Executive Officer of AMAX and a director of RST, testified at his deposition, on page 37, that the AMAX board was not asked to pass on this matter. (Uncontested Fact No. 13).

20. On November 17, 1969, Prain issued a statement, which was sent to RST stockholders, that RST and the Government of Zambia had agreed on the principal terms

by which the Government would acquire a majority interest in the mining interests of RST. (Uncontested Fact No. 14, in part). The salient provisions are (PX-2):

(a) that the aforesaid operations would be merged into the company to be known as Roan Consolidated Mining, Ltd. (RCM) in which INDECO would own 51 percent, RST approximately 37 percent, and the remainder by other companies known as the Anglo-American Group because of its minority interest in certain of the RST companies;

(b) that in payment for such operation, INDECO would issue negotiable bonds guaranteed by the Zambian Government in the amount of $151,000,000 of which RST would receive 75 percent;

(c) that RST will manage the operations of RCM and act as sales agent for a minimum period of 10 years, for which RST will receive one and one-half percent of RCM's gross sales revenue plus two percent of RCM's profits after mineral taxes but before income taxes;

(d) that RCM will pay quarterly dividends not subject to dividend limitation and which will equal the net income of RCM after provision for reserve for exploration and development in an amount approved by the entire board of RCM;

(e) that *all* of the assets of RST except those sold to the Zambian Government will be transferred to a new corporation outside of Zambia and that such assets consist principally of cash of approximately $40,000,000, a 30 percent interest in Botswana RST Ltd. (BRST), interests in Baluba Mines Limited and certain other exploration companies, the Ametalco

group of companies,[1] the aforesaid INDECO bonds *and* RST shares in RCM. The November 17 announcement ends with the following statement:

"The board [of RST] expressed its confidence that the agreement [with the Zambian Government] would afford a sound basis for future relationships in the interests both of the Republic of Zambia and of RST's shareholders."

21. By Memorandum to the Directors of RST dated December 10, 1969, Prain recommended, *inter alia*, that all of the RST assets, except cash balances to be externalized to a Luxembourg subsidiary and except those assets to be sold to the Zambian Government, be transferred to a newly formed corporation in another country under the name "RST International" and that RST become an international mining company. (PX-3; Notes of Testimony, hereinafter "N. T.", 444, 450-451). He also stated that the major shareholder (AMAX) had requested him to become chairman of the international corporation. (PX-3).

22. On December 11, the RST board met and unanimously approved Prain's recommendations. Ian MacGregor, who is Chief Executive Officer of AMAX and a director of RST, was present at that meeting and ap-

---

1. AMETALCO, Inc., a New York corporation, is wholly owned by AMETALCO, Ltd., a United Kingdom corporation which is wholly owned by another United Kingdom corporation which is a 100% subsidiary of RST. AMETCO Shipping Co., a New York corporation, is wholly owned by AMETALCO, Inc., which was purchased by RST from AMAX in 1963 for a consideration of one million shares of RST. The Chairman of the board of AMETALCO, Inc., is Sir Ronald Prain (Prain) who is also chairman of the Board of RST and a director of AMETALCO, Inc., AMETCO Shipping Co., and RST; Jean Vuillequez, Executive Vice-Chairman of RST is also a director of those three companies and is chairman of the board of AMETCO Shipping Co. (Uncontested Fact No. 4).

proved such resolution. (PX-3; PX-27; Uncontested Fact No. 16, in part).

23. On December 22, 1969, a committee of the directors of RST approved the agreement between and among the Republic of Zambia, INDECO and RST. (Uncontested Fact No. 18).

Under the agreement between the Zambian Government and RST dated December 24, 1969 INDECO will acquire at book value a 51% interest in the operating copper properties controlled by RST, in exchange for compensation in the form of bonds to be issued by INDECO and to be guaranteed by the Republic of Zambia. Among other things, the agreement provides that contracts will be entered into whereby RST or a company nominated by it will continue to act for a period of ten years as manager and sales agent of the operations. The agreement also states that the possessor of the management contract must hold not less than 24 percent (later negotiated to 20 percent) of the RCM stock.

The Zambian properties will be held by a Zambian company known as RCM (Roan Consolidated Mines, Ltd.), but referred to in the agreements as OPCO, hereinafter referred to as RCM, in which the Government will own a 51% stock interest, RST 36.75% and the remaining 12.25% will be owned by the Anglo-American Group which now holds a minority interest in RST's Zambian properties.

In addition, the agreement permits the assets of RST, not required for Zambian copper producing, smelting and refining, including the bonds and RCM stock referred to, to be received as compensation from INDECO, to be transferred to holders outside Zambia.

This characterization of the agreement is not intended to be complete and the argreement contains other impor-

tant provisions. (Uncontested Fact No. 19, in part; N. T. 187).

D. Acquisition of RST by AMAX.

24. In mid-December 1969, Ian MacGregor, RST director and Chief Executive Officer of AMAX, proposed to RST an amalgamation of RST and AMAX. His purpose in doing so was to protect AMAX's investment in RST. (N. T. 386).

25. On December 19, 1969, RST's management retained N. M. Rothschild & Sons, London merchant bankers, to assist it in discussions with AMAX. (N. T. 192-93, 160-61). On January 17, 1970, RST retained Kuhn, Loeb & Co., New York investment bankers, to work jointly with Rothschild's. (N. T. 503-08).

26. The two persons who were authorized by AMAX to negotiate on behalf of AMAX were MacGregor and Donahue (President of AMAX), who were and are members of the RST board. (PX-7). At these negotiations, MacGregor felt that the other shareholders (*i.e.* non-AMAX shareholders) of RST "were being more than amply represented by directors other than myself." (N. T. 395). Indeed, MacGregor stated, "I have only one company, American Metal Climax." (N. T. 386).

27. After several months of negotiations, in which Rothschild's and Kuhn, Loeb represented and advised RST (N. T. 163), the Agreement in Principle for the amalgamation of AMAX and RST, dated March 5, 1970 (PX-9) was entered into. (Uncontested Fact No. 25). In essence, the agreement provides for the consolidation of RST's Zambian operating assets into Roan Consolidated Mines, Limited ("RCM"), a Zambian corporation, 51% of which will be sold to INDECO for INDECO bonds, pur-

suant to the agreement of December 24, 1969 with the Government of Zambia; pro rata distribution to all RST shareholders of the INDECO bonds thus acquired; pro rata distribution to all RST shareholders of RST's shares of Botswana RST Limited; pro rata distribution to all RST shareholders of the shares in RCM, except to the extent that the Zambian Government has required 20% of the RCM shares to be retained by RST, and acquisition of the remainder of RST by AMAX, for which AMAX will pay to other RST shareholders approximately $76.2 million principal amount of 8% AMAX subordinated debentures with common stock warrants attached and $6.3 million in cash. (PX-9).

28. More specifically the agreement in principle provides for the following (PX-6; PX-9; DX-6A);

Non-AMAX shareholders of RST, who own 25.4 million or 57.7% of the total RST shares, will receive the following in complete redemption of their shares:

(a) $6.3 million in cash, representing $.25 per RST share.

(b) Their approximate pro rata share ($2 principal amount per RST share) of the 6% Zimco bonds.

(c) Approximately 16.75% of the shares of RCM.

(d) Their pro rata share (57.7%) of RST's 30.2% (947,401 shares) of Botswana RST Limited, which has a controlling interest in a proposed Botswana copper-nickel mining venture.

(e) Approximately $76.2 million principal amount ($3 principal amount per RST share) of 8% AMAX debentures, subordinated to all present and future AMAX debts, due January 1, 1986, with one seven-year AMAX common stock warrant attached to each

$100 principal amount of debentures. The warrants will be exercisable at $47.50 per share and will be detachable and exercisable six months after issuance.

After the reorganization, RST will be a wholly-owned subsidiary of AMAX and RST will own the following:

(i) Approximately 42.3% of $40 million principal amount of the Zimco bonds to be received by RCM;

(ii) 42.3% of RST's present interest in Botswana RST;

(iii) 20% of the shares of RCM;

(iv) 100% of the Ametalco group of companies;

(v) The contracts to manage the RCM mines and to sell their output pursuant to previously announced agreements in principle with the Zambian Government;

(vi) Miscellaneous exploration and other assets both inside and outside of Zambia; and

(vii) Net current assets of approximately $63 million remaining in the RST Group, based on estimated January 1, 1970 figures.

AMAX will receive, *inter alia*, the following benefits if the Agreement in Principle between RST and AMAX is consummated:

(a) AMAX's annual income will be increased by $7 million calculated at a $.50 per pound copper price;[2]

---

2. Between January 9, 1970 and May 4, 1970, the closing bids for cash on the London Metal Exchange for electrolytic copper wirebar ranged between 71.46 cents and 78.38 cents per pound. (Uncontested Fact No. 35).

(b) AMAX's cash flow will be improved by $134 million over the period of 1970-1975;

(c) AMAX's foreign balance of payments position will be improved by $91 million;

(d) Although AMAX will increase its net exposure in Africa by about $24 million, 4½ years of incremental earnings after the acquisition will recoup this; (PX-5, p. 1).

(e) AMAX will be acquiring high yielding assets. (PX-5, p. 6).

29. At a March 5, 1970 meeting, the Board of AMAX approved the agreement in principle unanimously. The members of AMAX who were either directors or alternate directors of RST abstained from such vote on advice of counsel although they stated they would support adoption of said plan. At that meeting MacGregor read to the AMAX Board a draft of a press release which was to be published as promptly as possible. The minutes of that meeting record the following:

> The Chairman thereupon read to the Board a draft of a press release which would be published as promptly as possible in London and New York after prior notification to the Zambian authorities at Lusaka. (Uncontested Fact No. 28).

30. On March 6, 1970, the committee authorized by the previous RST Board meeting met and voted to accept the agreement in principle and that a joint announcement of RST and AMAX be released to the stock exchanges and the press on March 6, 1970, and be distributed to shareholders on March 10, 1970. (Uncontested Fact No. 29).

31. On March 6, 1970, a joint announcement relating to the terms of the Agreement in Principle between AMAX and RST was made by RST and AMAX and was transmitted by Morgan on behalf of RST and received by plaintiff in this judicial district.

32. The March 6, 1970 joint announcement of RST and AMAX to RST's stockholders was designed to advise RST stockholders in summary form of the broad outline of occurrences and arrangements important to the future of the company. There were no misstatements of fact in this communication and, in view of its preliminary nature, there were no omissions of material facts. (PX-6).

33. RST is at present engaged, with the assistance of its investment bankers and advice of counsel in Zambia, the United Kingdom, and New York in preparing a statement, in the nature of a proxy statement, concerning the proposed reorganization for the information of its shareholders. It is contemplated that the explanatory statement will be mailed to shareholders in June and a shareholders' meeting will be held in July. (N. T. 465).

34. For the agreement between AMAX and RST to take effect, it must be adopted by the vote of the holders of three-quarters of all RST shares represented in person or by proxy at the shareholders' meeting.[3] (Zambia Companies Ordinance, §§ 14, 104 (1965)).

---

3. Counsel for AMAX has represented to the Court that RST will also present, for a separate vote, the agreement and reorganization to the non-AMAX shareholders of RST voting as a class. Even though no prescribed vote of this separate class is required for approval under the Zambia Companies Ordinance and even though the Agreement in Principle between AMAX and RST (PX-9) makes no specific mention of this special vote, counsel has assured us that the reorganization will not be consummated unless it is approved by a majority of the non-AMAX shareholders participating in the class vote. *See, e.g.,* Defendant's Trial Memorandum, p. 24.

35. Even if the required shareholder vote is obtained, the proposed reorganization will not be effectuated unless it is approved by the High Court of Zambia. (PX-9; Zambia Companies Ordinance, §§ 14-20, 95). When the proposed reorganization is presented to the High Court for approval, the High Court, under controlling precedent, must be satisfied that the proposed plan is fair and equitable to all shareholders. *British and American Trustee and Finance Corporation, Limited and Reduced vs. Couper*, (1894) A. C. 399; *See also* Magnus and Estrin, *Companies Law and Practice* (4th ed.).

36. AMAX has undertaken to obtain stock exchange listings for the debentures and warrants which it will issue. (PX-9). It is expected that the debentures will be listed on the New York Stock Exchange and that the warrants will be listed on the American Stock Exchange. (N. T. 574). Arrangements are being made for the listing in the United States of the RCM shares which will be distributed to RST's public stockholders (N. T. 570), and efforts are being made to likewise list the INDECO bonds which the RST public stockholders will receive. (N. T. 571). The Botswana shares are presently traded in the United States over-the-counter market. (N. T. 570-71).

37. AMAX' management, in seeking approval of the proposed reorganization by the AMAX board of directors, valued at $6.62 per share the package of securities which RST's stockholders will receive upon the proposed reorganization. (PX-5, p. 5). Mr. Wright of Kuhn, Loeb valued the same package as of March 5, 1970 at $7.13 per share. (N. T. 563). At that time, RST stock was trading on the New York Stock Exchange at $6.25 per share. (N. T. 564).

38. In view of the general stock market decline since March 5, 1970, Mr. Wright testified that the value of the package of securities to be distributed to RST's stockholders had declined to between $6.70 and $6.75 per share on May 18, 1970, when RST's stock was trading on the New York Stock Exchange at 5⅝'s. (N. T. 563-64).

39. Rothschild's and Kuhn, Loeb orally advised RST's Board of Directors prior to the execution of the agreement in principle between RST and AMAX that the proposed reorganization was fair and equitable and in the best interests of RST stockholders and that it was preferable to other reorganization proposals which had been considered. (N. T. 167-68, 452, 508).

II. Opinion.

The issues in this case are as follows:

(1) Whether this Court has *in Personam* jurisdiction over RST;

(2) Whether the March 6, 1970 statement released to the press by the chairman of RST and AMAX and subsequently sent by RST to its shareholders violated Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78 (1964), and Rule 10b-5 of the Securities Exchange Commission, promulgated thereunder;

(3) Whether the terms of the proposed reorganization of RST, whereby certain assets of RST and certain securities of AMAX will be distributed to the non-AMAX shareholders of RST in redemption of their shares, are unfair to the RST stockholders and constitute fraud and deceit upon, and a breach of fiduciary duty owed to, such shareholders by AMAX;

(4) (a) Whether the proposed reorganization, if effectuated, is violative if Section 7 of the Clayton Act, 15 U. S. C. § 18 (1964), because it may substantially lessen competition in United States commerce, and (b) whether the alleged interlocking directorates of RST and AMAX are violative of Section 8 of the Clayton Act, 15 U. S. C. § 19 (1964).

(1) *Jurisdiction of RST.*

RST has moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint as to it on the ground that this Court lacks *in personam* jurisdiction over RST. RST does not challenge the propriety of the venue, the service of process or subject matter jurisdiction, but rather asserts that the maintenance of personal jurisdiction over it would be violative of due process of law under the principles outlined in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

Under *International Shoe*, in order to find that it is constitutional to exercise personal jurisdiction over RST we must find (1) that RST has minimum contacts with this forum and (2) that it is fair and reasonable to require the defendant to defend this action. *See also*, 2 Moore's Fed. Practice § 4.25[5], at 1169-70. We have concluded that this dual test has been satisfied.

We believe that RST has minimum contacts with this forum by virtue of Morgan's activities on its behalf in communicating with RST's American shareholders. It is clear that RST communicates with its American shareholders solely through Morgan and that in performing this task, Morgan has regularly sent materials to RST shareholders who are domiciled in Pennsylvania. RST seeks to argue away these contacts on the ground that Morgan is acting

as the agent of the American shareholders and not as the agent of RST by virtue of a contract with American shareholders included in their share certificates. Cutting through form, however, Morgan is performing tasks RST would perform if Morgan were not hired to do them and, at the very least, Morgan is the agent and vehicle by which RST communicates with its American shareholders. Further, it is these very contacts which give rise to this litigation since plaintiff challenges some of the documents he has received from RST through Morgan to be violative of the Securities and Exchange Act of 1934. Under these circumstances, we find RST to have minimum contacts with this forum.

Secondly, it does not offend our notions of fair play and substantial justice to exercise jurisdiction over RST. RST is an international corporation of major proportions. Several of its directors and alternate directors are American and it has held directors' meetings in the United States. Approximately 40,000 United States citizens, including AMAX, own approximately 80% of RST. It certainly cannot be considered an undue hardship to require it to defend this action.

Accordingly, RST's motion to dismiss will be denied.

(2) *Disclosure.*

The plaintiff's allegation of violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78, and Rule 10b-5 promulgated thereunder, concerns the March 6, 1970 statement (PX-6) which was released to the press by the chairmen of RST and AMAX and subsequently sent by RST through Morgan to its shareholders. While we agree that, in an appropriate case, a United States District Court has the power to enjoin continuation of a course

of conduct which violates Rule 10b-5,[4] we do not find that this is such a case. The statement of March 6, 1970 was issued for the salutary purpose of informing RST's shareholders and the investment community, in summary form, of the basic terms of the proposed reorganization immediately after their formulation and agreement. There were no affirmative misstatements in the statement. (Finding of Fact No. 32). As to the omissions which plaintiff complains would be material to informed stockholder decision, it is expected that the further statement, in the nature of a proxy statement, will supply all material information. We do not think that the defendants here can be held liable for alleged material omissions in a communication to stockholders which we have found to be summary in form, broad in outline and preliminary in nature. (Finding of Fact No. 32).

Accordingly, plaintiff's motion for a preliminary injunction based on alleged violations of Rule 10b-5 is denied. In the event the plaintiff asserts that the communication, which will be ultimately sent to the stockholders, itself violates the standards of disclosure incorporated in Rule 10b-5, the Court will rule on that question at the time it is presented and make any Order which appears appropriate at the time. Further, it should be noted in connection with the class action aspect of this case that the Court has ordered that a full disclosure be made in the communication to be sent to the RST stockholders of the pendency of this law suit, together with a full and fair disclosure of the relevant contentions of the parties. (*See* our Order, *infra*).

(3) *Fairness of the Reorganization.*

Plaintiff seeks a preliminary injunction against the proposed reorganization on the further ground that the re-

4. *See, e.g., Kahan v. Rosenstiel, et al.*, — F. 2d —, No. 18120 (3rd Cir. 1970).

organization is unfair to the non-AMAX shareholders of RST as a result of fraud and a breach of fiduciary duty by AMAX. It is clear that plaintiff's request for a preliminary injunction invokes our traditional equity powers and is addressed to our discretion. It is also clear that in order to grant a preliminary injunction we must find

> (1) that there is a likelihood that movant will succeed in the ultimate action;
>
> (2) that plaintiff will suffer irreparable harm if no preliminary injunction is granted; and
>
> (3) that the harm to the plaintiff outweighs the injury the defendants might suffer as a result of granting the injunction.

For the reasons set out below, we have decided to deny plaintiff's motion for a preliminary injunction without prejudice.

We have concluded that the motion for a preliminary injunction on this ground s premature. The record reveals that the proposed reorganization will not occur in fact until and unless (a) the RST shareholders approve the reorganization by a ¾ vote[5] (Finding of Fact No. 34), and (b) the High Court of Zambia approves the reorganization, finding that it is equitable to all shareholders. (Finding of Fact No. 35). In addition, either AMAX or RST may exercise its option to terminate the agreement to reorganize under provision 11 of the Agreement in Principle (PX-9). In view of these circumstances, we believe that the time is not yet ripe for us to decide the issue presented. There are several reasons for our action, namely:

---

5. We also note that counsel for AMAX has assured us that the reorganization must also be approved by a majority of all non-AMAX shareholders. (*See* Footnote 2, *supra*).

(1) because of what is yet to occur, there may be no reorganization at all or a reorganization in a form different than the plan presently before us;[6]

(2) in order to balance the equities in this case it would be significant to know whether and under what circumstances the shareholders of RST and the High Court of Zambia approved the proposed reorganization; and

(3) until the RST shareholders and the Zambian Court approve the plan we do not think that plaintiff will suffer any injury, or certainly not an irreparable injury required for the granting of a preliminary injunction;

(4) further, the granting of the preliminary injunction might well cause irreparable harm to the defendants since it would prevent them from communicating with the stockholders about a plan of reorganization which might ultimately be determined to be fair and reasonable. This well might make it virtually impossible for RST to consummate its agreement with the Zambian Government.

Accordingly, plaintiff's motion for a preliminary injunction on the ground that the proposed reorganization is unfair to the non-AMAX shareholders of RST and is a result of fraud and breach of fiduciary duty by AMAX will be denied without prejudice to plaintiff's renewal of said motion in accordance with this Opinion.

---

6. For example, the High Court of Zambia may approved the proposed reorganization conditioned on matters not presently in the defendants' plan.

(4) *Clayton Act.*

It is plaintiff's contention that if the proposed reorganization is effectuated it may result in a substantial lessening of competition in violation of Sections 7 and 8 of the Clayton Act, 15 U. S. C. §§ 18, 19. Therefore, we are urged to grant injunctive relief under 15 U. S. C. § 26[7] to block the proposed reorganization of RST and AMAX.

In determining whether the requested injunctive relief should issue, we sit as a court in equity. So constituted, we are allowed broad discretion to consider and weigh the relevant facts. Employing these powers, we have concluded that at this time the motion for a preliminary injunction, founded on alleged violations of the anti-trust laws, must be denied. In reaching this result, we have been motivated by reasoning similar to that employed in our disposition of Issue (3), *supra*, to wit, given the fact that the proposed plan of reorganization has yet to be finally approved it would be premature for this Court to decide the question that, if and when approved, the reorganization will violate the Clayton Act. Indeed, the express language of 15 U. S. C. § 26 requires that, *inter alia*, before a preliminary injunction may issue, the plaintiff must show "that the danger of irreparable loss or damage is immediate." The very fact that the reorganization has yet to meet with stock-

7. In pertinent part, this Section reads as follows:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by violation of the antitrust laws, including 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . ."

holder approval and has yet to receive the imprimatur of the High Court of Zambia belies the "immediacy" of plaintiff's claim. Hence, we find that there is no evidence of any immediate irreparable loss or damage as relates to the anti-trust claims in this case.

Our denial of plaintiff's motion for a preliminary injunction, founded on alleged violations of the Clayton Act, will be without prejudice to their resubmission to this Court at an appropriate time. We should note that, if and when presented, the Court would expect that the record on the anti-trust issue will be considerably amplified on the question of potential anti-competitive effects of the proposed reorganization (assuming that the present plan, or one similar, is adopted) particularly in light of Defendant AMAX's arguments that (1) the actual commercial effect of the proposed reorganization will be a reduction in AMAX's present interest in RST's copper operations, and (2) assuming that the reorganization will result in an increase of AMAX's interest in the copper business, whether AMAX and RST are competitors ". . . in any line of commerce in any section of the country . . ." within the meaning of Section 7 of the Clayton Act, 15 U. S. C. § 18.

III. Conclusions of Law.

1. This Court has subject matter jurisdiction over this action, venue is properly laid here, and the Court has personal jurisdiction over the defendants.

2. This action is properly maintainable as a class action under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure. The class consists of all shareholders of RST, other than AMAX.

3. The March 6, 1970 joint statement of RST and AMAX, sent to all RST shareholders, contained no mis-

statements of, nor omissions to state, material facts in violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78, and Rule 10b-5, promulgated thereunder.

4. Plaintiff's motion for a preliminary injunction on the ground that the proposed reorganization is unfair to non-AMAX shareholders of RST as a result of AMAX's alleged fraud and breach of fiduciary duty is premature for the reasons outlined in our Opinion.

5. The plaintiff's motion for a preliminary injunction, founded on alleged violations of Sections 7 and 8 of the Clayton Act, 15 U. S. C. §§ 18, 19, is premature for the reasons outlined in our Opinion.

ORDER.

AND NOW, this 8th day of June, 1970, it is ORDERED that:

(1) The Motion of defendant RST to dismiss the complaint as to it on the ground of lack of *in personam* jurisdiction be and the same is hereby DENIED;

(2) The Motion of plaintiff for a preliminary injunction be and the same is hereby DENIED WITHOUT PREJUDICE;

(3) This action may be maintained as a class action under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure; the class consists of all shareholders of defendant RST other than defendant AMAX; under Rule 23(d) of the Federal Rules of Civil Procedure all members of the class shall be notified in the statement being drafted to inform stockholders of the proposed reorganization (See Finding of Fact No. 33) of

(a) the pendency of this litigation, the claims made by the plaintiff, the defenses put forward by the de-

fendants, and the decision of the Court rendered this day at this stage of the litigation; and

(b) the opportunity of any member of the class to intervene in the action by notification to Harold Kohn, the named plaintiff, of his desire to intervene (Mr. Kohn may then make an appropriate motion to the Court); and

(c) the opportunity of any member to signify by notice to the Court whether he considers the named plaintiff to be an adequate and fair representative of the class in view of the different tax treatment he receives as compared with the treatment received by other general stockholders, or if for any other reason he considers the named plaintiff an inadequate representative of the class.

With respect to the form of this notification, counsel will submit to the Court for approval an agreed-upon form.

(4) The Motion of the Intervenors to Intervene as plaintiff-members of the class is GRANTED.

THOMAS A. MASTERSON,

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CLASS ACTION
CIVIL ACTION NO. 70-933.

HAROLD E. KOHN, TRUSTEE, ET AL.,
Plaintiffs,

v.

AMERICAN METAL CLIMAX, INC., ET AL.,
Defendants.

PRELIMINARY INJUNCTION.

AND NOW, this 12th day of August, 1970, upon Motion of plaintiffs, and the Court having considered such Motion and the Affidavits and Memoranda filed on behalf of defendants and the Record herein, and after hearing on said Motion, it is hereby ORDERED and DECREED as follows:

Defendants and their agents are preliminarily enjoined and restrained from taking any action or doing anything further with respect to the distribution of the assets of defendant RST or its subsidiaries pursuant to the Amalgamation Agreement with defendant AMAX, until after final hearing and Order in this matter, except that and provided, however, that defendants are permitted to appear before the High Court of Zambia to seek approval only of the acquisition of 51% of the RST operating mining assets in Zambia, pursuant to the agreement between defendant RST and Zambia.

In issuing this preliminary injunction the Court adopts its Findings of Fact made in its Opinion and Order of June 8, 1970. On the basis of those Findings of Fact and upon a review of the explanatory statement, accompanying documents and letters sent to all RST shareholders, the Court makes the following conclusions of law:

1. That the plaintiff has demonstrated a strong probability that he will ultimately succeed in proving

A. The terms of the acquisition of RST by American Metal Climax, Inc. (AMAX) are unfair to the non-AMAX shareholders of RST.

B. AMAX controls nine of the thirteen RST directors, and a tenth director of RST, who was chairman of a committee of two directors which gave final approval to the RST-AMAX agreement, owns in excess of 26,000 shares of AMAX common stock valued in excess of $900,000.00.

C. The material mailed by RST seeking shareholder approval of the RST-AMAX agreement and the RST-Zambian Government agreement contains materially false and misleading statements in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder including the following:

(1) it fails to disclose that the RST agreement with the Zambian Government is not dependent on the amalgamation agreement between RST and AMAX and misleads the public shareholders of RST into believing that the agreement with AMAX is a necessary consequence and part and parcel of the agreement with the Zambian Government;

(2) it falsely represents that if the subject amalgamation resolutions are not approved by the RST shareholders, RST cannot comply with the RST-Zambian Government;

(3) it fails to adequately describe the actual benefits to AMAX under its agreement with RST, which is also in violation of this Court's Order and Opinion dated June 8, 1970;

(4) the opinions of the investment bankers that the proposal is fair and equitable to all of the RST shareholders are not based upon an independent survey or appraisal or study of RST's mining properties, mineral reserves and exploration rights.

2. The Court further finds that unless preliminary relief is given, the public shareholders of RST will suffer irreparable harm, in that, if after final hearing judgment is entered for plaintiffs, it will be impracticable and impossible to order divestiture and a rescission of the aforesaid RST-AMAX agreement and place the parties back into their prior positions, and damages will not be an adequate remedy.

3. The harm which would be suffered by plaintiffs and the class they represent clearly outweighs any harm which may be suffered by defendants as a result of being preliminarily enjoined.

The Court did not learn until August 5th, 1970 that the High Court's confirmation of the reduction of capital and subsidiaries Plan would have the effect of cancelling, by operation of law, RST shares held by shareholders other than AMAX. The order will also vest the rights of non-AMAX shareholders to receive the cash and securities they

are to receive under the Plan. RST is scheduled to appear before the High Court of Zambia on Friday, August 14, 1970.

Prior to August 5, the Court was under the impression that there would be some time, if and when the High Court of Zambia approved the Plan, before the Plan would be consummated. It appears, however, the acquisition of RST by AMAX will effectively become irrevocable if and when the High Court approves the Plan.

Plaintiffs shall post a bond in th amount of $25,000.00.

Final hearing in this matter shall commence on Tuesday, September 8, 1970, at 10:00 a.m. in the United States Court House in Philadelphia, Pennsylvania.

The Emergency Judge in authorized to enter this order.

THOMAS A. MASTERSON, J.
by JOSEPH S. LORD, III,
Emergency Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 19,175 and 19,176.

HAROLD E. KOHN, TRUSTEE,

v.

AMERICAN METAL CLIMAX, INC.

and

ROAN SELECTION TRUST, LIMITED,

AMERICAN METAL CLIMAX, INC.,
Appellant in No. 19,175,

ROAN SELECTION TRUST, LIMITED,
Appellant in No. 19,176.

(D. C. Civil No. 70-933).

Present: KALODNER FREEDMAN and ADAMS, *Circuit Judges.*

PER CURIAM.

Before us is a motion for a stay or, in the alternative, for expedited hearing and for other relief, sought by the Appellants in the above-entitled cases from an injunction entered on August 12, 1970 by the District Court for the Eastern District of Pennsylvania.

We held an extensive hearing on the motion in which counsel for both Appellants and counsel for Appellee appeared and were heard.

In the course of the argument before us Marvin Schwartz, Esquire, counsel for American Metal Climax,

Inc., one of the Appellants, informed the Court of the willingness of American Metal Climax, Inc. to provide substantial security against any injury which Appellee may suffer from the entry of the stay of the preliminary injunction. The statement appears in the excerpt of the proceedings before this Court which will be filed and be made part of the record of this proceeding.

We believe in balancing the equities as between Appellants and Appellee especially in view of the offer of security by American Metal Climax, Inc., that the likelihood of injury to Appellee is reduced far below the likelihood of irreparable damage to Appellants if the preliminary injunction remains in effect.

We therefore enter the following

ORDER.

The preliminary injunction entered by the District Court on August 12, 1970 is hereby stayed on the representation made by American Metal Climax, Inc. as to the entry of security in favor of Appellee, said representation to be fully carried out on or before the close of business Monday, August 17, 1970, or if the High Court of Zambia has not approved the plan by that time then within forty-eight hours after the time of such approval.

The representations on the basis of which this order is entered are as follows:

> All non-liquid assets of Roan Selection Trust, Limited to be frozen, and in no event transferred or assigned without prior written permission of the District Court; cash or satisfactory marketable securities in the minimum market value of $10 million be posted with the Clerk of the District Court or kept in escrow in a national bank or banks, approved by the District Court.

In the event that securities are posted the market value of which declines, such decline shall be repaired within forty-eight hours. Any interest accruing on the cash deposit or any dividends or other cash distribution from the securities shall inure to the benefit of American Metal Climax, Inc.; however, any stock dividends or similar distributions shall be retained by the Clerk of the District Court or the bank or banks as the case may be, as further security.

The security shall inure to the benefit of the Appellee as against either or both of the Appellants.

The aforesaid securities shall remain until the final disposition of the case.

By THE COURT,

KALODNER,

Circuit Judge.

Dated: August 13, 1970.

EXCERPT OF PROCEEDINGS BEFORE CIRCUIT COURT OF APPEALS.

JUDGE KALODNER: I think it would be a good idea to get a statement from Mr. Schwartz now. Let's see what we have before us. It may effect the course of your argument, Mr. Kohn.

For the record, will you give your name?

MR. SCHWARTZ: My name is Marvin Schwartz.

JUDGE KALODNER: I know it well, but I wanted the court reporter to have it.

MR. SCHWARTZ: I am pleased to be remembered, Your Honor.

I represent American Metal Climax, of course, with Mr. Van Dusen.

This transaction will take the form of distribution in kind of certain of the assets of RST to the public stockholders of RST. Thereafter, when the transaction is approved by the High Court for Zambia and the order is approved and filed with the Registrar of Companies in Zambia, then the transaction will become effective, and all of the publicly-held shares of RST will become cancelled so that AMAX will then become the sole stockholder of RST and therefore indirectly will own all of the assets remaining after there is this distribution in kind and cash to the non-AMAX stockholders.

If the Court sets aside or stays the injunction which has been granted by Judge Masterson—we say without a hearing—my client will undertake that for such reasonable period as the Court directs, and except upon prior application to the District Court on good cause, that it will keep intact and will not dispose of or transfer except to a wholly-

owned subsidiary—and I will explain why I want to put that in—any non-liquid production assets of RST remaining.

Now, the reason, Your Honors, why I ask for the inclusion of transfers to a subsidiary is this: As Mr. Barnum pointed out earlier, one thing the Government of Zambia was willing to concede in their effort to get RST to give this interest over to them voluntarily to make unnecessary the act of expropriation which could be condemned throughout the world, one thing Zambia was willing to give up by a voluntary transaction was that RST could take out of the country its liquid assets not necessary for production of copper in Zambia. This had been piling up over the years because the Zambians had not let it be expropriated under the control laws. One objective to this whole transaction is not a turnover of 51 percent of the Zambian copper mines to the Zambian government until we have our hands on it outside of Zambia the cash. In other words, it would be foolish to go to a real estate closing deal, deliver title and not take a certified check. So, therefore, if and when this transaction is consummated it would be in the best interests of all concerned that liquid assets be gotten out of Zambia, and by gotten out of Zambia I mean be gotten out of the hands of the Zambian corporation.

RST is now a Zambian corporation, and it may be that when this transaction is consummated AMAX will want to take everything out into a subsidiary which is not a Zambian corporation. That is the whole purpose of this transaction, and that is why I make this qualification.

JUDGE KALODNER: Let me ask one question so that I get an idea of the amount of liquid assets. You mentioned before the sum of $40 million.

MR. SCHWARTZ: Yes, sir.

JUDGE KALODNER: Does that comprise virtually all of the non-liquid assets?

MR. SCHWARTZ: Net current assets. It includes such things as receivables, short-term receivables, but there is a net current balance of $68 million, as a matter of fact, and there are also bonds of various African governments involved, and I see no interest in anyone in maintaining them so there is no great problem.

May I point out American Metal's net current assets today are $280 million. If it would be to Your Honors' disposition that some fund be held in escrow I would recommend to my client that it be done, but this is one of the great-in-size corporations in the United States.

JUDGE KALODNER: Could you make a suggestion how big or how far it ought to go?

MR. SCHWARTZ: Your Honor, I know my client is so concerned in effecting this transaction before the Zambian Government grabs 49 percent, the remaining 49 percent, at the same book value that they paid for the 51 percent, so concerned that that go through they will put into escrow almost anything Your Honors might decide.

JUDGE FREEDMAN: Give us an idea of what you think we might say is equitable.

MR. SCHWARTZ: Your Honors, AMAX is paying for its disproportionate shares of the RST assets its own subordinated debentures having a face value of $76 million, to which are attached warrants.

JUDGE FREEDMAN: How much?

MR. SCHWARTZ: $76 million, to which are attached warrants exercisable now, I guess, at 15 points above the market, although I haven't followed the market that recently.

I don't think anyone could suggest with a straight face that if there were an underpayment it was as much as 100 percent. I suppose the range of error, if Judge Masterson is disposed to find a range of error, would be somewhere in the area of 5 to 15 percent. I don't think it would be beyond the wildest dreams that anyone could suggest the range in excess of something like $10 million, but if the Court desired a fund of that magnitude be placed in escrow I would hope that the income could inure to AMAX so it would be placed in Treasuries or some good paper. I am confident my client would go along with my recommendation.

JUDGE FREEDMAN: What is the Zambian Government giving you for the face——

MR. SCHWARTZ: Face amount, $117 million bonds, and expert testimony at the trial is they will sell beyond 60 or 70 on the face.

My client's concern, as I said, is that it will get for the remaining assets of RST, if there is any delay in this transaction, the same kind of paper at the same token book value.

JUDGE FREEDMAN: What kind of assets would you be able to place in escrow; bonds?

MR. SCHWARTZ: Either cash or bonds.

JUDGE FREEDMAN: Does the corporation have substantial amounts of cash which it could put in escrow?

MR. SCHWARTZ: Yes, or securities of a form that is satisfactory to the Court. As I said, this company has net current assets of $280 million.

JUDGE KALODNER: So that I may focus on what I conceive to be the proposition, all of the non-copper assets would be frozen?

MR. SCHWARTZ: That is non-liquid assets.

JUDGE KALODNER: The non-liquid assets would be frozen, and cash or satisfactory securities in the amount of $10 million be posted with the Clerk of the District Court?

MR. SCHWARTZ: Or kept in escrow in a bank or some satisfactory arrangement.

JUDGE KALODNER: All right.

MR. SCHWARTZ: I would hate to have the interest in these times lost.

JUDGE KALODNER: That would be a matter of no small concern, and there would be no question about that.

JUDGE ADAMS: The company would be entitled to the interest.

JUDGE KALODNER: There is no doubt about that. The fund would be recoverable subject to whatever damages should be found.

JUDGE FREEDMAN: Until the final hearing in this case, which should be expedited.

MR. SCHWARTZ: Yes, sir.

JUDGE KALODNER: Until the final disposition.

MR. SCHWARTZ: Yes.

If Your Honors think it will help the disposition I will be willing to do it.

JUDGE FREEDMAN: Do what?

MR. SCHWARTZ: I will recommend to my client $10 million be placed in escrow to secure judgment. I urge it is not necessary, but we are willing to do it.

(A portion of the proceedings was not reported at this point.)

MR. SCHWARTZ: May I report on the telephone call we had?

JUDGE KALODNER: Yes.

JUDGE FREEDMAN: Mrs. Williams, will you take this?

MR. SCHWARTZ: I spoke by telephone with Mr. McGregor, the chairman of the board and chief executive officer of American Metal Climax. He has confirmed my authority to enter into the agreement I stated before I left.

May I add one more thing?

(Further proceedings were not reported.)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLASS ACTION
CIVIL ACTION NO. 70-933.

HAROLD E. KOHN, TRUSTEE, ET AL.
Plaintiffs,

v.

AMERICAN METAL CLIMAX, INC.
and
ROAN SELECTION TRUST, LIMITED, ET AL.,
Defendants.

FINDINGS OF FACT, OPINION, CONCLUSIONS OF LAW AND ORDER.

MASTERSON, *J.* November 25, 1970

PROCEDURAL HISTORY.

On April 8, 1970 plaintiff, a trustee of American Depositary Receipts representing 2000 shares of Roan Selection Trust, Ltd., (RST), a Zambian corporation, filed a complaint against defendants, American Metal Climax Company (AMAX) and Roan Selection Trust, Ltd., seeking to enjoin the proposed amalgamation of the defendant companies on the grounds that the disclosure provisions of the Securities Exchange Act had been violated, that the amalgamation was violative of the antitrust laws, was unfair to non-AMAX shareholders of RST, and was effectuated by the fraud and breach of fiduciary duty on the part of certain directors of RST. From May 11th to 18th a hearing was held on plaintiff's motion for a preliminary injunction.

On June 8th we filed an Opinion, making Findings of Fact and Conclusions of Law, denying without prejudice plaintiff's request for a preliminary injunction on the grounds that it was premature in that (1) before the amalgamation could be effectuated it would have to be approved by the shareholders who, prior to the vote, were to be sent an explanatory statement which was intended to fully explain the proposed amalgamation, and (2) if and when the shareholders voted in favor of the plan, it would then have to be submitted to the High Court of Zambia for its approval. In late June, just prior to the time when the explanatory materials were to be sent, plaintiff made a motion to enjoin their distribution on the ground that they were violative of the Securities Exchange Act. On July 2nd we held a hearing on plaintiff's motion and, at that hearing, enjoined the distribution of the explanatory materials. The defendants' appeal from this action was dismissed on the ground that, since no written order had been executed by the District Court, the Court of Appeals had no jurisdiction. On July 8th we entered a written order enjoining the distribution of the materials unless certain conditions were met by defendants. These conditions were met and we allowed the materials to be sent without prejudice to the plaintiff's claims that the materials were violative of the Securities Exchange Act. On August 5th, just prior to the time when the proposed amalgamation was to be put before the shareholders for a vote, plaintiff again made a motion to enjoin the defendants from taking any further steps to effectuate the amalgamation. We denied plaintiff's motion on that same day only insofar as it sought to enjoin the amalgamation from being put before the shareholders for a vote. On the balance of plaintiff's motion we held a hearing on August 12th. On August 6th the shareholders voted to approve the reduction of capital, the first step necessary to effectuate the amalgamation. On August 12th we preliminarily en-

joined the amalgamation, making Findings of Fact and Conclusions of Law that the plaintiff had demonstrated a strong probability that he would, upon final hearing, be granted relief. We set the case down for a final hearing for September 8th. On August 13th the defendants appealed our August 12th Order. On that day, the Court of Appeals stayed the effect of our Order upon certain conditions, one of them being that the defendant AMAX would deposit with the Court ten million dollars as security for any injury plaintiff might suffer from the granting of the stay. On August 14th the High Court of Zambia approved the reduction of capital. Also on August 14, 1970, plaintiff made a motion to the Court of Appeals for a re-hearing of the August 13th appeal and for an amendment to the Court of Appeals Order of August 13th. On August 31st the Court of Appeals amended and supplemented its August 13th Order in certain respects and further ordered that this court proceed forthwith with the trial and disposition of the case, notwithstanding the pendency of an appeal from our preliminary injunction, and that we reach final judgment prior to October 29, 1970. On August 25, 1970 plaintiff made a motion for leave to file an amended and supplemental complaint and for summary judgment. During this time we continued generally the final hearing scheduled for September 8th. On September 14th we granted plaintiff's motion for leave to file an amended and supplemental complaint and on that day the complaint was filed adding, *inter alia*, new party defendants. On September 21st the defendants moved for summary judgment. On September 25th we heard oral argument on the cross motions for summary judgment and on September 30th both motions were denied. On October 5th the trial of this case commenced and a jury was called. On that day, after the calling of the jury, the parties entered into a stipulation waiving their rights to a jury trial. At that time the case against the new defendants

added on September 14th was severed and it was agreed that the case should proceed solely against the defendant companies, the trial being continued to October 13th. On October 8, 1970 plaintiff moved in the Court of Appeals for a further amendment of the Court of Appeals Order of August 31st. The Court of Appeals amended its August 31st Order to extend the time for our final disposition of the case from October 29, 1970 to November 27, 1970. The trial commenced as scheduled and continued to November 3, 1970. At the conclusion of the trial, we ordered that briefs and proposed Findings of Fact and Conclusions of Law be submitted on November 11th and that replies to those briefs and Findings of Fact be submitted on November 13th. On November 16th we heard oral argument.

After careful consideration of the entire record in this case, we enter the following

Findings of Fact, Opinion, Conclusions of Law, and Order.

I. Findings of Fact.

A. *Nature of Action and Jurisdiction.*

1. This action was originally brought in three counts by plaintiff, Harold E. Kohn, trustee for the Pension of Harold E. Kohn, P. A., attorneys-at-law, against defendants AMAX and RST. It was brought both as a derivative action on behalf of RST and as a class action on behalf of all shareholders of RST, except AMAX, and principally seeks to enjoin AMAX from acquiring some of the assets of RST remaining after the acquisition of control of RST by the Government of Zambia.

2. Count I was brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j, and Rule 10b-5, 17 C. F. R. § 240.10b-5, promulgated thereunder.

In substance, it charges that AMAX conspired with one or more of the directors of RST to perpetrate a fraud on the non-AMAX shareholders of RST and that, pursuant to this conspiracy, they made untrue statements of material fact and omitted to state other material facts necessary to be stated in order to make the statements made not misleading.

3. Count II charged AMAX with the above-mentioned fraud and with a breach of fiduciary duty owed to RST and its non-AMAX shareholders.

4. Count III was brought only as a derivative action on behalf of RST. It charges that the proposed acquisition of RST by AMAX is violative of Section 7 of the Clayton Act, 15 U. S. C. § 18, and that an alleged interlocking of directorates between AMAX and RST is violative of Section 8 of the Clayton Act, 15 U. S. C. § 19.

5. On September 14, 1970 we granted plaintiff leave to file an amended and supplemental complaint, which the plaintiff filed that same day. Essentially, the amended and supplemental complaint asserts the same grounds for relief as the original complaint. However, additional defendants, who are either officers and/or directors of or financial advisers to the defendant corporations, were named.

6. The Court has subject-matter jurisdiction over plaintiff's claim that defendants violated the Securities Exchange Act of 1934 under Section 27 of that Act, as amended, 15 U. S. C. § 78aa.

7. The Court has subject-matter jurisdiction over plaintiff's claim of fraud and breach of fiduciary duty by the defendants under 28 U. S. C. § 1332.

8. The Court has subject-matter jurisdiction over plaintiff's antitrust claims under 15 U. S. C. § 26.

9. Venue is proper in this District under section 27 of the Securities Exchange Act of 1934, as amended, 15 U. S. C. § 78aa, and under 28 U. S. C. § 1391(c) and (d), § 1401.

10. This Court has personal jurisdiction over the defendants AMAX and RST.

B. *Principals Involved.*

11. Plaintiff, Harold E. Kohn, Trustee, for the Pension Plan of Harold E. Kohn, P. A., Attorneys-at-law, holds American depositary receipts representing 2,000 ordinary shares of RST which are listed for trading on the New York Stock Exchange. Plaintiff is a citizen of the Commonwealth of Pennsylvania, resides in the Eastern District of Pennsylvania, and purchased such American depositary receipts on January 14, 1970. (Uncontested Fact No. 1[1]).

12. There are approximately 40,000 shareholders of RST in the United States (See Uncontested Fact No. 10) and United States citizens, other than AMAX, own approximately 37.7% of RST. (Uncontested Facts Nos. 5 and 9). Motions to intervene as party plaintiffs were granted to approximately 265 shareholders of RST, representing approximately 550,000 shares of RST. In our Order of June 8, 1970, we ordered that this action could be maintained as a class action pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure.

---

1. Prior to the hearing in May, 1970, the parties entered into a Stipulation of Uncontested Facts, which was signed by the parties and made a part of the record in this action and was relied upon by this Court in its Opinion and Findings of June 8, 1970. When plaintiff, in his motion for summary judgment, asserted that certain facts had been established as a result of the Stipulation, the defendant objected on the basis that these facts were not *now* uncontested. However, we find that for all purposes of this litigation the Stipulation of Uncontested Facts is binding upon its signatories.

13. Defendant AMAX, a listed company on the New York Stock Exchange, is a New York corporation with its principal place of business at 1270 Avenue of the Americas, New York, New York, and is licensed to do business in the Commonwealth of Pennsylvania. (Uncontested Fact No. 2). AMAX is a major producer, fabricator and marketer of metals and minerals. AMAX is the owner of 42.3% of the issued shares of RST. (Uncontested Fact No. 5, in part).

14. At the time suit was instituted, defendant RST was a corporation organized and existing under the laws of the Republic of Zambia, with its principal place of business in Zambia. RST's executive office was located at Kafue House, Cairo Road, Lusaka, Zambia; its central and registered office was located at Mpelembe House, Broadway, Ndola, Zambia. RST, since at least 1955, has reported annually to the Securities and Exchange Commission (SEC) on Form 20-K with its Annual Report to shareholders annexed. Its principal business was the production, smelting and refining of copper in Zambia. (Uncontested Fact No. 3).

15. On January 7, 1970, RST organized RST International, Inc., a wholly-owned Delaware subsidiary, for the purpose of externalizing RST's Zambian assets after the nationalization. RST International, Inc., pursuant to an Order of the United States Court of Appeals for the Third Circuit, dated August 31, 1970, entered their appearance as a party defendant in this action on September 25, 1970.

16. The Morgan Guaranty Trust Company of New York (Morgan), the American depositary of RST shares, regularly performs the following functions:

(a) mails annual quarterly reports supplied to it by RST to registered American shareholders of RST

(Deposition of Regis E. Moxley, Vice-President of Morgan, p. 6);

(b) distributes cash dividends of RST to American shareholders (Moxley Dep., p. 8);

(c) mails other reports, announcements, documents and circulars of RST to American shareholders (Moxley Dep., pp. 10-13).

In performing these services, Morgan is paid by RST. The fees paid Morgan by RST for these and other services amounted to over $300,000 for the period July 1, 1968 to June 30, 1969. (Plaintiff's Exhibit, hereinafter "PX", No. 22).

C. *Nationalization of RST.*

17. In the spring of 1968, the Zambian Government announced a limitation of dividends that may be paid outside the country to 50% of net profit. This is commonly referred to as the Mulinguishi Declaration. (Uncontested Fact No. 7).

18. On August 11, 1969, the President of Zambia announced ("Matero Declaration") the desire of the Zambian Government to acquire controlling equity interests in the operating copper properties in Zambia. Thereafter, RST was obliged by the Government to negotiate the sale of 51% interest in the copper producing, smelting and refining businesses conducted in Zambia by certain of its operating subsidiaries. (Uncontested Fact No. 8, in part).

19. Between August 11, 1970, and November 17, 1970, RST's efforts were devoted almost entirely to the intense negotiations with the Zambian Government concerning nationalization. RST's chief concern in the negotiations was to secure the agreement of the Zambian Government to

allow RST to transfer its domicile and to externalize its assets. "Externalization" here means the freeing of assets from Zambian exchange controls. (Notes of Trial Testimony, Final Hearing, pp. 369-71).[2] The negotiations were conducted on behalf of RST by Messrs. Jean Vuillequez and R. H. Page, RST's Executive Vice-Chairman and Chief Financial Officer, respectively. AMAX did not formally take part in the negotiations between RST and the Government of Zambia, but was kept advised of the progress of such negotiations by RST, supplied technical assistance to RST in the drafting of proposals, and advised RST of its views as to certain of the issues, particularly urging that the agreement with the Zambian Government include complete externalization. (PX-151). (Uncontested Fact No. 12, in part). Sullivan and Cromwell, attorneys for both AMAX and RST, took an active part in these negotiations. (DX-50).

20. On November 17, 1969, the RST board met and unanimously approved an agreement in principle to be entered into between the Government, the Industrial Development Corporation of Zambia, Ltd. (INDECO) (a Government corporation) and RST. (Uncontested Fact No. 13, in part). Prior to the execution of the agreement, AMAX had made known to RST its opinion that the agreement was as favorable to RST as could be expected under the circumstances. (Uncontested Fact No. 13, in part).

21. On November 17, 1969, after unanimous approval by the RST Board, Sir Ronald Prain, Chairman of the Board, issued a statement, which was sent to RST stockholders, that RST and Zambia had agreed on the principal

2. Hereafter, citation to the Notes of Trial Testimony of the Final Hearing in October will be in the form "N. T. F. H." and citation to the Notes of Trial Testimony of the Preliminary Hearing in May will be in the form "N. T. P. H."

terms by which the Government would acquire a majority interest in the mining properties of RST. (Uncontested Fact No. 14, in part; DX-1).

22. On December 22, 1969, a committee of the directors of RST approved the agreement between and among the Republic of Zambia, INDECO and RST. (Uncontested Fact No. 18). The salient provisions of that agreement are:

(a) that the mining operations of RST would be merged into a company to be known as Roan Consolidated Mining, Ltd. (RCM) in which INDECO would own 51 percent, RST 36.75 percent, and the remainder of 12.25 percent, by other companies known as the Anglo-American Group because of its minority interest in certain of the RST companies;

(b) that in payment for such operation, INDECO would issue negotiable bonds guaranteed by the Zambian Government in the amount of $151,000,000 of which RST would receive 36.75 percent;

(c) that RST, or a company nominated by it, will manage the operations of RCM and act as sales agent for a minimum period of 10 years, for which RST or its nominee will receive one and one-half percent of RCM's gross sales revenue plus two percent of RCM's profits after mineral taxes but before income taxes;

(d) that the holder of the management contract hold not less than 20 percent of RCM stock;

(e) that RCM will pay quarterly dividends not subject to dividend limitation and which will equal the net income of RCM after provision for reserve for exploration and development in an amount approved by the entire board of RCM;

(f) that *all* of the assets of RST except those sold to the Zambian Government may be transferred to a new corporation outside of Zambia and that such assets consist principally of cash of approximately $60,000,000, a 30 percent interest in Botswana RST, Ltd. (BRST), interests in Baluba Mines Limited and certain other exploration companies, the Ametalco group of companies,[3] the aforesaid INDECO bonds *and* RST shares in RCM;

(g) that the acquisition by Zambia of 51% of RST be approved by the RST shareholders. (DX-1; Uncontested Fact No. 19, in part)

D. *Acquisition of RST by AMAX.*

23. On August 11, 1969, the date the "Matero Declaration" was announced, Sir Ronald Prain and his colleagues began giving serious consideration to the externalization of RST's assets and making RST an international mining house to avoid being "locked in Zambia". It was decided to make externalization a condition to RST's agreeing to the Zambian Government's nationalization plan. (N. T. F. H. 369). In fact, such an "externalization program" was incorporated in the agreement in principle. (See Finding of Fact No. 22(f), *supra*).

---

3. AMETALCO, Inc., a New York corporation, is wholly owned by AMETALCO, LTD., a United Kingdom corporation which is wholly owned by another United Kingdom corporation (RSTIM, LTD.) which is a 100% subsidiary of RST. AMETCO Shipping Co., a New York corporation, is wholly owned by AMETALCO, Inc., which was purchased by RST from AMAX in 1963 for a consideration of one million shares of RST. The Chairman of the Board of AMETALCO, Inc., is Sir Ronald Prain, who is also chairman of the Board of RST and a director of AMETALCO, Inc., AMETCO Shipping Co., and RST; Jean Vuillequez, Executive Vice-Chairman of RST is also a director of those three companies and is chairman of the Board of AMETCO Shipping Co. (Uncontested Fact No. 4, in part).

24. Between August 11, 1969 and November 17, 1969, Prain did not discuss with anyone except Vuillequez the possibility of RST's becoming an international mining house. Both expressed their concern that such a plan might involve RST's becoming a competitor of AMAX. (N. T. F. H. 378-79).

25. In late November, Prain raised with Ian MacGregor, who is Chairman of the Board of AMAX and a director of RST, the idea of RST's becoming an international mining house. At that time MacGregor noted the possible adverse competitive impact this might have on AMAX and mentioned that the only possible solution would be for AMAX either to sell all or part of its RST shares or to buy all or part of the RST shares it did not already own. (N. T. F. H. 380-81). Prain and MacGregor had no further discussions on this point until December 11, 1969. (N. T. F. H. 383-84).

26. By memorandum to the Directors of RST dated December 10, 1969, Prain recommended, *inter alia*, that all of the RST assets, except cash balances to be externalized to a Luxembourg subsidiary and except those assets to be sold to the Zambian Government, be transferred to a newly formed corporation in another country, most likely the United States or Luxembourg, under the name "RST International" and that RST become an international mining company. (PX-3; N. T. 444, 450-51). He also stated that the major shareholder (AMAX) had requested him to become chairman of the international corporation. (PX-3). The RST management had concluded that the formation of an international mining company would be accompanied by a distribution to RST shareholders of some cash and all the Zimco bonds. The RST management had so concluded because it felt that RST had a moral obligation both (1) to distribute to its shareholders that which RST had received

(i.e., the Zimco bonds) for Zambia's taking over 51% of the company and (2) to distribute some cash to make up for dividend restrictions imposed by Zambia in the past as well as to provide additional compensation for the take-over. The management also concluded that distributing the Zimco bonds to stockholders all over the world would minimize the political and economic risk of default by Zambia in the payment of principal or interest. (N. T. F. H. 374-75, 1284-87).

27. On December 11, the RST board met and unanimously approved Prain's recommendations. Ian MacGregor, who is Chief Executive Officer and Chairman of the Board of AMAX and a director of RST, was present at that meeting and approved such resolution. (PX-3; PX-27; Uncontested Fact No. 16, in part).

28. On that same day, December 11, 1969, MacGregor proposed to Prain an amalgamation of RST and AMAX. His purpose in so doing was to protect AMAX's investment in RST. (N. T. P. H. 386). One of AMAX's primary reasons for seeking to amalgamate with RST was to acquire RST's cash for AMAX's own requirements in financing its foreign investment projects in the production of nickel and bauxite. AMAX anticipated that it would be short of capital because of these extensive projects. (PX-5, pp. 8-9; PX-57 [3a]). MacGregor's proposal envisioned a "distribution to the non-AMAX shareholders of RST of certain of the RST assets and some type of debenture from AMAX to make up whatever value was negotiable." (N. T. F. H. 384). Prain asked whether the AMAX debentures could be substituted with AMAX common stock, but this suggestion was totally dismissed as a possibility by MacGregor.

3a. Since we are satisfied that PX-57 is an internal AMAX memorandum, we have admitted it into evidence over defendants' objections.

(N. T. F. H. 557-58). MacGregor did not represent to Prain that this amalgamation proposal had the authorization of the AMAX board.

29. On December 19, 1969, RST's management retained N. M. Rothschild & Sons, London merchant bankers, to advise RST in its discussions with AMAX. (N. T. P. H. 192-93, 160-61). In these negotiations, AMAX was advised by Lehman Brothers, New York investment bankers. On January 17, 1970, RST retained Kuhn, Loeb & Co., New York investment bankers, to work jointly with Rothschild's. (N. T. P. H. 503-08). The negotiations were held over a period of approximately 2½ months, culminating on March 5, 1970, when the parties entered into an Agreement in Principle for the amalgamation of AMAX and RST. (PX-9; Uncontested Fact No. 5).

30. The two persons who were authorized by AMAX to negotiate on its behalf were MacGregor and Donahue (President of AMAX), who both were and are members of the RST board. (PX-7). Also intimately involved in the negotiations for AMAX was Harold K. Hochschild, a member of both the AMAX and RST boards, and former President and Chairman of the Board of AMAX. (N. T. F. H. 1032-36). Aside from its investment bankers, RST was represented in the negotiations by *inter alia*, Prain, Jean Vuillequez and R. H. Page, a director and Vice-President of RST. (N. T. F. H. 309, 508).

31. Throughout these negotiations, MacGregor felt that non-AMAX shareholders of RST were being more than amply represented by RST directors other than himself. (N. T. P. H. 395). In the process of negotiation, MacGregor's sole concern was for the interests of AMAX. (N. T. P. H. 386; N. T. F. H. 919). This concern was shared

by Harold Hochschild, who considered himself part of the AMAX negotiating team only. (N. T. F. H. 1036).

32. During the course of negotiations many avenues were explored. Since Prain felt that the best course for RST would be to become an international mining house, and since he was aware of AMAX's objections to this plan for competitive reasons, RST offered, in early January, 1970, to buy out AMAX's total interest in RST. (N. T. F. H. 392-4063. MacGregor summarily dismissed this proposal. (N. T. F. H. 406, 425).

33. RST felt that their proposal for a total buy-out of AMAX's interest was too hastily dismissed by MacGregor and, thus, in late January or early February, 1970, again offered this proposal together with a plan to buy-out a part of AMAX's interest. Also, at this time, RST again presented a plan to become an international mining house. (N. T. F. H. 417-26).

34. AMAX, principally through MacGregor, again rejected any buy-out of its interest by RST. (See N. T. F. H. 822-28; DX-14, p. 6).

35. On the other hand, AMAX proposed two plans, to wit: (1) a total liquidation of RST which would have reduced RST to a mere management company in Zambia and (2) an amalgamation of AMAX and RST whereby AMAX would substantially increase its percentage holding in RST by buying-out the public shareholders interest in RST. (N. T. F. H. 428). Prain rejected the total liquidation proposal out of hand since he and his non-AMAX colleagues felt that such a proposal was not in the interests of RST stockholders. (N. T. F. H. 428-29).

36. At this juncture RST investigated the possibility of amalgamating with a company other than AMAX. How-

ever, RST was advised by its investment bankers that, in their opinion, there was no such company (N. T. F. H. 429, 433-34).

37. Thus, in early February, 1970, the only alternatives open to RST were amalgamation with AMAX or becoming an international mining house. At this time, Prain remained steadfast in the view that the best course for RST would be to become an international mining company, knowing full well, however, that such a course would be totally unacceptable to AMAX. (N. T. F. H. 392, 407, 559; see Finding of Fact Nos. 25, 32, *supra*).

38. On or about February 26, 1970, Prain concluded that the best interests of RST lay in an amalgamation with AMAX rather than in becoming an international mining company. (N. T. F. H. 392-93). The reasons given for Prain's change of mind were: (1) he was advised by RST's investment bankers that if RST were to become an international mining house (a) its borrowing power would be limited (N. T. F. H. 393-95) and (b) consequently, RST would have to generate capital internally and would have less earnings available for distribution to stockholders as dividends (N. T. F. H. 395); (2) becoming an international mining house would involve competing with AMAX (N. T. F. H. 400); (3) RST was orally advised on February 19, 1970, by its tax counsel, Wayne C. Chapman, Esquire, of Cravath, Swaine and Moore, that if RST were to be domiciled in either Luxembourg or in the United States and if there were to be a distribution, as contemplated, of cash and Zimco bonds (N. T. F. H. 395-399), such a distribution would result in an unequal tax impact on different classes of RST shareholders. (N. T. F. H. 1157-62). An additional reason given by RST's investment advisers, but not subscribed to by Prain, was that RST's

management had not been created to develop an international mining house nor could they have attracted such talent. (N. T. F. H. 746).

39. RST and its investment advisers did consider the consequences of RST's becoming an international mining house without making a distribution of cash and Zimco bonds to RST shareholders but concluded that this avenue was unacceptable for the reasons previously outlined (see Finding of Fact No. 26) as well as for other tax problems which the failure to make a distribution would create. (N. T. F. H. 1284-87). RST's tax counsel, Mr. Chapman, was never requested to render any opinion as to the tax impact on the shareholders if RST were to become an international mining house without making a distribution. (N. T. F. H. 1172-73).

40. It was at this time, on or about February 26, 1970, that RST's management began for the first time to seriously consider amalgamation with AMAX and to come to grips with the problem of negotiating its terms (N. T. F. H. 401).

41. For this purpose, *inter alia*, the RST board met on February 28, 1970, and adopted the following resolution:

> That a committee of any two of Sir Ronald Prain, Mr. J. Vuillequez and Mr. R. H. Page be appointed to settle any such amalgamation if an offer on the lines discussed was forthcoming

(Uncontested Fact No. 26; PX-79).

41(a). In the event that the negotiations with AMAX concerning amalgamation did not result in an agreement, RST, as late as March 4, 1970, was giving serious consideration to implementing the previously agreed upon interna-

tional mining house plan (See Finding of Fact Nos. 26, 27, *supra*), albeit in its modified "twinning" form. (N. T. P. H. 472-75). The twinning concept involved leaving the RCM stock and some other assets in a Zambian corporation, creating a new Luxembourg corporation wholly independent of the Zambian corporation to hold the cash and other externalized assets and distributing to the shareholders single share certificates representing stockholdings in both companies. (PX-33). The hoped for effect of the twinning proposal was to preserve for the RST stockholders the tax credit they enjoyed as a result of a tax treaty. AMAX's strong opposition to the "twinning" plan forced RST to realistically view it as an alternative only if amalgamation with AMAX could not be worked out. (PX-5, Appendix, p. 10).

42. One day later, on March 5, 1970, the Agreement in Principle for the amalgamation of AMAX and RST was signed by Mr. Ian MacGregor of AMAX and Mr. H. J. Hinves of RST. (Uncontested Fact No. 25; PX-39). Prior to the execution of the agreement, RST's investment bankers orally advised RST's board of directors that the proposed reorganization was fair and equitable and in the best interests of RST stockholders and that it was preferable to other reorganization proposals which had been considered. (N. T. P. H. 167-68, 452, 508).

43. At a March 5, 1970 meeting, the board of AMAX approved the Agreement in Principle unanimously. The members of AMAX who were either directors or alternate directors of RST abstained from such vote on advice of counsel although they stated they would support adoption of said plan. (Uncontested Fact No. 28).

44. The committee authorized by the RST board meeting of February 28, 1970, consisted of Vuillequez and Page.

This committee met on March 6, 1970, and voted on behalf of RST to accept the Agreement in Principle to amalgamate with AMAX. (Uncontested Fact No. 29; N. T. F. H. 508).

45. In essence, the Agreement provides for the consolidation of RST's Zambian operating assets into RCM, a Zambian corporation, 51% of which will be sold to INDECO for INDECO bonds, pursuant to the agreement of December 24, 1969 with the Government of Zambia; pro rata distribution to all RST shareholders of the INDECO bonds thus acquired; pro rata distribution to all RST shareholders of RST's shares of Botswana RST Limited; pro rata distribution to all RST shareholders of the shares in RCM, except to the extent that the Zambian Government has required 20% of the RCM shares to be retained by RST, and acquisition of the remainder of RST by AMAX, for which AMAX will pay to other RST shareholders approximately $76.2 million principal amount of 8% AMAX subordinated debentures with common stock warrants attached and $6.3 million in cash. (PX-9).

46. More specifically the Agreement in Principle provides for the following (PX-6; PX-9; DX-6A):

Non-AMAX shareholders of RST, who own 25.4 million or 57.7% of the total RST shares will receive the following in complete redemption of their shares:

(a) $6.3 million in cash, representing $.25 per RST share;

(b) Their approximate pro rata share ($2 principal amount per RST share) of the 6% Zimco bonds;

(c) Approximately 16.75% of the shares of RCM;

(d) Their pro rata share (57.7% of RST's 30.2%) (947,401 shares) of Botswana RST Limited, which has

a controlling interest in a proposed Botswana copper-nickel mining venture;

(e) Approximately $76.2 million principal amount ($3 principal amount per RST share) of 8% AMAX debentures, subordinated to all present and future AMAX debt, due January 1, 1986, with one seven-year AMAX common stock warrant attached to each $100 principal amount of debentures. The warrants will be exercisable at $47.50 per share and will be detachable and exercisable six months after issuance.

After the reorganization, RST will be a wholly-owned subsidiary of AMAX and RST will own the following:

(i) Approximately 42.3% of $40 million principal amount of the Zimco bonds to be received by RCM;

(ii) 42.3% of RST's present interest in Botswana RST;

(iii) 20% of the shares of RCM;

(iv) 100% of the Ametalco group of companies;

(v) The contracts to manage the RCM mines and to sell their output pursuant to previously announced agreements in principle with the Zambian Government;

(vi) Miscellaneous exploration and other assets both inside and outside of Zambia; and

(vii) Net current assets of approximately $63 million remaining in the RST Group, based on estimated January 1, 1970 figures.

At the time of the Agreement, AMAX anticipated that it would receive, *inter alia*, the following benefits as a result of the Agreement in Principle between RST and AMAX:

(a) AMAX's annual income would be increased by $8.7 million calculated at a $.50 per pound copper price[4] (PX-5, p. 1; N. T. F. H. 1096-97);

(b) AMAX's cash flow would be improved by $134 million over a period of 1970-1975;

(c) AMAX's foreign balance of payments position would be improved by $91 million;

(d) Although AMAX would increase its net exposure in Africa by about $24 million, 4½ years of incremental earnings after the acquisition would recoup this (PX-5, p. 1);

(e) AMAX would be acquiring high yielding assets (PX-5, p. 6).

46(a). The Agreement between RST and Zambia granted RST discretion regarding adopting a plan for externalization and set no time limit for this purpose. (DX-1, p. 5). The Zambian Government had also indicated its willingness to cooperate in any plan of externalization which RST might devise, subject of course to any of the requirements in the aforesaid Agreement. (PX-64, p. 10). There was no requirement that nationalization and externalization had to proceed simultaneously. In fact, the Zambian Government indicated a strong desire to effectuate nationalization without much delay and to have the externalization plan follow later. (PX-86; PX-138).

47. For the agreement between AMAX and RST to take effect, it had to be adopted by the vote of the holders of three-quarters of all RST shares represented in person or

4. Between January 9, 1970 and May 4, 1970, the closing bids for cash on the London Metal Exchange for electrolytic copper wirebar ranged between 71.46 cents and 78.38 cents per pound. (Uncontested Fact No. 35).

by proxy at the shareholders' meeting scheduled for August 6, 1970. (Zambian Companies Ordinance, §§ 14, 104 (1965)). Prior to our Opinion of June 8, 1970, counsel for AMAX represented to the Court that RST would also present, for a separate vote, the agreement and amalgamation to the non-AMAX shareholders of RST voting as a class. Even though no prescribed vote of this separate class was required for approval under the Zambia Companies Ordinance and even though the Agreement in Principle between AMAX and RST (PX-9) made no specific mention of this special vote, counsel had assured us that the reorganization would not be consummated unless it were approved by a majority of the non-AMAX shareholders participating in the class vote. *See, e.g.*, Defendant's Trial Memorandum, p. 24.

48. On or after July 8, 1970, the RST stockholders were sent an Explanatory Statement with Appendices containing information intended to allow the stockholders to make an informed decision whether or not to approve the amalgamation with AMAX. The Explanatory Statement and Appendices contained approximately 200 pages of highly complex and technical financial and legal data. Accompanying these materials was a cover letter, dated July 7, 1970 from Sir Ronald Prain to the shareholders (PX-41) stating, *inter alia*, that in the opinion of the RST board the proposed amalgamation with AMAX was in the best interests of RST and urged them to vote in favor of the Resolutions. Also accompanying these materials was a one page letter, dated July 7, 1970, from the plaintiff to the RST shareholders (Court Exhibit 2) setting forth plaintiff's contentions in this lawsuit. (See also PX-45).

49. Included in the materials sent to the stockholders was a proxy card or instruction from (PX-44) upon which

the stockholders could authorize Morgan Guaranty Trust Company, the American Depository, either to vote for or against the amalgamation and nationalization, both of which were presented as one resolution and could not be voted upon separately.

50. RST's management actively sought to obtain stockholder approval for the proposal by taking the following steps: (1) hiring firms to solicit proxies (PX-42, p. 20; PX-148); (2) when shareholders instructed the American Depositary to vote against the proposal, a letter was sent over Prain's signature requesting that they give further consideration to the proposal and reiterating Prain's firm conviction that the proposal was in the best interests of all shareholders of RST. Enclosed in Prain's additional solicitation was another Instruction Form and return envelope, with postage affixed. (PX-46).

51. On August 6, 1970, the shareholders voted on the resolutions for nationalization and amalgamation with AMAX. The recorded vote of all RST shareholders present and voting showed 85.5% in favor and 14.5% opposed. At a separate meeting of non-AMAX RST shareholders, the resolutions passed with 66% in favor and 34% opposed. (DX-27, pp. 2-3).

52. On August 14, 1970, the High Court of Zambia approved the Reduction of Capital necessary for amalgamation. (DX-27(Y)). On August 15, 1970, the High Court's approval of the Reduction of Capital was registered. (DX-28). The effect of the registration of the Court's Order was to cancel and render void all issued shares of RST other than those held by AMAX and its nominees. (See Affidavit of John G. Harkins, Jr., Esq., filed August 12, 1970; Affidavit of David Ffinlo Quirk, filed September 24, 1970). Then the RST Board of Directors adopted resolutions authorizing

the distribution to shareholders other than AMAX of the cash and securities described in the Explanatory Statement.

E. *Interests of Directors, Advising Bankers and Others.*

53. AMAX owns 42.3% of RST. (Uncontested Fact No. 5).

54. Selection Trust, Ltd. (Selection) together with its subsidiaries, owns 11.8% of AMAX. (PX-42, p. 5).

55. Charter Consolidated, Ltd., (Charter) and its subsidiaries, own approximately 27% of Selection Trust, Ltd. (PX-42, p. 13).

56. At all times material to this action, RST had 13 directors, six of whom were and are directors of AMAX. Of the six common directors, three are present and two are former officers of AMAX; the other seven directors of RST, including the Chairman, Executive Vice-Chairman and the President of RST, are neither directors nor officers of AMAX. (Uncontested Fact No. 5, in part). Four of RST's directors are also directors of Selection Trust, Ltd. (PX-43, p. 0-1).

57. Sir Ronald Prain, Chairman of the Board of RST, is also a director of Selection, in which he owns 4,875 shares. (PX-43, p. 0-1, 2). Prain has been retained by AMAX as chairman-designate of RST, International, Inc., and owns 2,250 shares of AMAX and 6,000 shares of RST. (N. T. F. H. 340; PX-43, 0-1, 2).

58. Jean Vuillequez, an RST director and one of the principal negotiators for RST in the AMAX negotiations, was employed by AMAX from 1917 through 1963. During that time, he held various offices in AMAX and, from 1956 through 1963, was a member of both the Executive Committee and the Board of Directors of AMAX. Vuillequez came to RST in January, 1964. (N. T. F. H. 350, 503, 507-

08). He is the owner of 26,169 shares of AMAX, worth approximately $1 million, and 16,236 shares of RST, worth approximately $80,000. (PX-43, 0-1, 2).

59. James L. Reid, a director of RST owns 412 shares of AMAX and 400 shares of RST. (PX-43, 0-1, 2).

60. Donald J. Donahue, one of the principal AMAX negotiators in its negotiations with RST, is a director of RST as well as being a director and President of AMAX. Donahue owns 8,529 shares of AMAX and 800 shares of RST, which are beneficially owned by AMAX, are held in his name. (PX-43, 0-1, 2).

61. Eric J. T. Goudie is a director of RST, in which he owns 800 shares, and Selection, in which he owns 13,785 shares. (PX-43, 0-1, 2).

62. H. J. Hinves, who, on behalf of RST, signed the Agreement in Principle with AMAX, is a director of RST and Selection. He owns 351 shares of AMAX, 808 shares of RST, and 891 shares of Selection. (PX-43, 0-1, 2).

63. Harold K. Hochschild, who was part of the AMAX negotiating team in its negotiations with RST, is both a director of RST and AMAX. From 1947 to 1957, Hochschild was Chairman of the AMAX Board and, together with other members of his family, owns approximately 10% of all the AMAX stock. Personally, Harold Hochschild owns 627,450 AMAX shares, and 800 shares of RST, which are beneficially owned by AMAX, are held in his name. (N. T. F. H. 822-23, 1032, 1036; PX-43, 0-1, 2).

64. Walter Hochschild is a director of both RST and AMAX. He owns 145,809 shares of AMAX, and 800 shares of RST, which are beneficially owned by AMAX, are held in his name. (PX-43, 0-1, 2).

65. Ian K. MacGregor, who is Chairman of the Board and Chief Executive Officer of AMAX, is also a director of

RST. MacGregor, who was one of the principal AMAX negotiators in its negotiations with RST, owns 26,651 shares of AMAX, and 800 shares of RST, which are beneficially owned by AMAX, are held in his name. (PX-43, 0-1, 2).

66. R. H. Page, executive vice-president and chief financial officer of RST, is also a director of RST. Page was one of RST's principal negotiators in its negotiations with the Zambian Government and AMAX. He owns 1,654 shares of RST. (N. T. P. H. 439-40, 453; PX-43, 0-1, 2).

67. John Payne, Jr., an AMAX vice-president, is both a director of RST and AMAX. He owns 13,023 shares of AMAX, and 800 shares of RST, which are beneficially owned by AMAX, are held in his name. (PX-43, 0-1, 2).

68. H. J. Wedgwood is a director of RST and owns 400 shares of RST. (PX-43, 0-1, 2).

69. E. C. Wharton-Tigar is a director of RST, AMAX and Selection. He owns 1,500 shares of AMAX, 800 shares of RST, and 9,000 shares of Selection. (PX-43, 0-1, 2).

69(a). AMAX controls RST because of its 42.3% stock interest in RST and because of its domination of the RST Board of Directors. (See, *e.g.*, PX-5, App., p. 10).

70. N. M. Rothschild & Sons was first retained as adviser to RST when AMAX held 51% of the stock of Rhodesian Selection Trust Company, a predecessor of RST. (N. T. F. H. 741-42). During the past two years, Rothschild's has acted for AMAX in acquiring and selling shares in financial markets and the total compensation paid by AMAX to Rothschild since January 1, 1967 has aggregated approximately $46,500. (PX-42, p. 6). A partner in Rothschild's is a director of Charter Consolidated Limited, and on May 1, 1970, that firm and its partners held beneficially 126,000 shares of Charter. (PX-42, p. 13). The aggregate fees of Rothschild and Kuhn, Loeb & Co., for their advice

and assistance to RST in the negotiations with AMAX, were approximately $1,000,000, exclusive of services in connection with judicial proceedings. This fee was to be paid by AMAX if the amalgamation were effectuated; otherwise, the cost would be borne by RST. (PX-42, p. 6; N. T. F. H. 577-78).

71. Since August 26, 1969, and throughout the negotiations with Zambia, Sullivan & Cromwell (S&C) which had represented RST and AMAX for over 35 years, advised RST as to the terms of both an agreement with the Zambian Government and forms of reorganization all of which included externalization. Sullivan & Cromwell had the main responsibility for drafting the RST agreement with Zambia. (PX-90; PX-107; PX-134, p. 2; DX-50, 1-3; Answer to Interrogatory No. 36(17)). Arthur H. Dean, senior partner in Sullivan and Cromwell, has been a director of AMAX since 1945. (DX-50, 1).

F. *Valuation.*

72. As of March 5, 1970, the date the Agreement in Principle between AMAX and RST was signed, Kuhn, Loeb ascribed the following values to RST's assets:

Net Current Assets	$ 69.5 million
INDECO Bonds	54.1 million
RCM Shares	120 million
Botswana Shares	22.7 million
Ametalco	13 million
Management Contract	12.5 million
Exploration Areas, Miscellaneous Investments in African Securities, Etc.	20 million
TOTAL	$311.8 million

(DX-43, II).

73. In exchange for the AMAX debentures and warrants, valued at $76.2 million, the public shareholders gave up their pro rata share (i.e. 57.7%) of RST's net current assets ($33.8 million), a small amount of Zimco bonds ($.7 million), 4½% of RCM ($14.5 million), and their proportionate interests in Ametalco ($7.5 million), the management contract ($7.2 million), exploration rights and other miscellaneous assets ($11.5 million), for a total of $75.2 million. All of the above valuations were made by Kuhn, Loeb as of March 5, 1970. (DX-43, II).

74. The valuation by RST's investment advisers of the AMAX debentures and warrants at $76.2 million on March 5, 1970, was too high. A $100 face value 8% subordinated debenture of AMAX was ascribed a value by Kuhn, Loeb of $88, and the attached warrant [5] was valued between $10 and $12. (N. T. P. H. 558-59; N. T. F. H. 1352-53, DX-6C,D). Or, in other words, the package of debenture and warrant was valued to sell at or below par (i.e. $100). Rothschild valued the package to sell at par or slightly under par, in a range of $98 to $100. (N. T. F. H. 767-69). On March 4, 1970, Rothschild valued an AMAX debenture with the warrant exercisable at $50, at $93. (PX-31; N. T. P. H. 197, 300).

75. Thus, the seller's (RST's) financial advisers, after valuing the buyer's (AMAX's) package as ranging between $93 and $100, nonetheless ascribed the highest value to the buyer's package.

76. For every $1 less than $100 that an AMAX debenture with warrant was valued, the total value ascribed to

---

5. A seven-year AMAX common stock warrant was attached to each $100 principal amount of debentures. The warrants are exercisable at $47.50 per share and are detachable and exercisable six months after issuance.

what AMAX was paying for the RST assets decreases by $762,000.

77. On the first day on which quotations are available, September 17, 1970, an AMAX debenture with warrant was quoted at $85½ bid and $87½ asked. (DX-43, XV).

78. The valuation on March 5, 1970, by RST's investment advisers of the total value of RST's miscellaneous assets purchased by AMAX was too low.

79. RST's investment advisers, Rothschild and Kuhn, Loeb, assumed the accuracy of all information and statements contained in the Explanatory Statement and did not make an independent survey or appraisal of RST's mining properties, mineral reserves, or exploration rights. (PX-43, Q-1,2).

80. On March 5, 1970, RST's investment advisers valued the so-called miscellaneous assets, including Fiji and the Baluba orebody, at $20 million. (DX-43, I, VIII). On January 10, 1970, Rothschild had evaluated these same assets at $33 million to $50 million. (PX-30).

81. On March 5, 1970, Rothschild and Kuhn, Loeb valued RST's mining exploration project in Fiji at $600,000, which represents the amounts expended by RST on the project up to December 31, 1969. (DX-43, VIII; N. T. F. H. 763-65; PX-43, I-5). The $600,000 figure places no value on the fact that a geological report, after preliminary surveys, most strongly recommended that exploration in Fiji continue since all the conditions were right for occurrence of porphyry copper over huge areas of high mineral potential. (PX-117; PX-140). On the basis of this

encouraging report, RST approved further expenditures for the Fiji program for the rest of 1970 of $350,000. (PX-43, I-5). Further, RST agreed to finance the acquisition of mining rights over additional areas on Fiji, with an estimated expenditure over a period of time of $165,000. (PX-43, I-5).

82. The geological report on Fiji was prepared on December 9, 1969. (PX-140). At the AMAX-RST meetings held from January 9 through 11, 1970, Sir Ronald Prain estimated the value of Fiji at $25 million, whereas Vuillequez estimated it at $1 million. (DX-14). A contemporaneous Rothschild estimate, prepared on January 10, 1970, valued Fiji at between $15 million and $20 million. (PX-30, p. 2; N. T. P. H. 299-301).

83. On March 5, 1970, Rothschild and Kuhn, Loeb valued RST's Baluba orebody at $4 million (DX-43, VIII), which is the approximate amount expended by RST on the project up to December 31, 1969. (N. T. F. H. 763, 1324, 1327).

84. During the first quarter of 1970, an additional $2.16 million was expended on the Baluba project. (PX-43, I-1).

85. During the meetings held between January 9 and 11, 1970, RST and its financial advisers reasonably evaluated Baluba, on a discount cash flow analysis, as worth between $4 million and $8 million. (PX-30; DX-14). Another discount cash flow analysis, upon which we place little weight, ascribed a negative value of up to $4 million for Baluba. (DX-30 in conjunction with PX-43, I-1; N. T. F. H. 763-64; 1317-30). During that weekend session Rothschild and AMAX tentatively agreed that Baluba was worth $6 million. (DX-14).

86. A confidential study prepared by AMAX for calendar year 1969 estimated the cost of the Baluba project at $44.8 million to produce approximately 1.8 million tons of copper of 2.71% at a per pound cost of 28.5 cents. (N. T. F. H. 1485). It is expected that the Baluba operations will be profitable by 1974. (PX-43, I-1).

87. In contrast, the cost of the Puerto Rican project, a joint venture between AMAX and Kennecott, was estimated by AMAX as $110 million to produce 910,000 tons of copper of .65% at a per pound cost of 33.06 cents. (N. T. F. H. 1484).

88. On March 5, 1970, Kuhn, Loeb and Rothschild valued RCM at 4.3 times 1969 pro forma earnings (which were unusually high due to the sale of stockpiles) or 5.9 times average 1967-69 pro forma earnings to arrive at a $325 million evaluation, or a $120 million evaluation of RST's 36.75% interest in RCM. On this basis, the 4½% disproportionate interest in RCM which AMAX acquired from RST's public shareholders was worth $14.5 million.

89. On January 10, 1970, Rothschild evaluated RST's interest in RCM from between $126 million and $202 million, using multiples of 5 and 8, respectively. (PX-30).

90. As of March 5, 1970, the average price/earnings ratio of leading copper companies was 11.2. (DX-43, IV).

91. The RCM management contract, which was for a minimum term of 10 years, was valued on March 5, 1970, by RST advisers at five times estimated annual earnings of $2.5 million, or $12.5 million, and the 57.7% interest therein to be acquired by AMAX was valued at $7.2 million. (DX-1; DX-43, I). In late January, 1970, this 57.7% interest in the

management contract had been valued by AMAX at $9 million and by Rothschild at $11.6 million. (PX-13).

92. The Ametalco group of companies and the sales contract with RCM was valued by RST's advisers at five times estimated annual earnings of $2.6 million, or $13 million. On this basis, the 57.7% interest to be acquired by AMAX was valued at $7.5 million. (DX-43, I, II). In late January, 1970, this 57.7% interest in Ametalco had been valued by AMAX at $9 million and by Rothschild at $11.6 million. (PX-13).

93. On July 11, 1969, AMAX valued Ametalco at between 5 and 15 times earnings. (PX-83). Later, on September 4, 1969, shortly after the "Matero Declaration", AMAX valued RST International Metals Ltd. (RSTIM), of which Ametalco was a wholly-owned subsidiary (See Footnote 3, *supra*) at 8 to 10 times average earnings of $2.9 million for the period 1965 to 1968. (PX-85(a), p. 2). Ametalco's earnings make up approximately 90% of RSTIM's earnings. (PX-83, p. 1; PX-85(a)).[6]

94. On January 10, 1970, Rothschild valued RSTIM at between 7 and 10 times estimated annual earnings of $2.3 million. (PX-30).

95. The following chart indicates the range of values ascribed by the parties, negotiators or advisers to the RST assets acquired by AMAX:

---

6. Since we are satisfied that PX-83 and PX-85(a) are internal AMAX memorandums drafted for AMAX employees concerning the amalgamation in question, we have admitted them over defendants' objections.

	(Millions)		
	Lowest Estimated Value	Highest Estimated Value	Agreed Upon Value [1]
Net Current Assets	69 [2]	69.5	69.5
INDECO Bonds	54.1	72 [3]	54.1
RCM Shares	120	202 [4]	120
Botswana Shares	22.7	22.7	22.7
Ametalco	13	48 [5]	13
Management Contract	12.5	20 [6]	12.5
Miscellaneous Assets	12 [7]	55 [8]	20
TOTAL	$303.3	$489.2	$311.8

1. See DX-43, II; Finding of Fact No. 72, *supra*.
2. See PX-30.
3. See PX-30.
4. See Finding of Fact No. 89, *supra*.
5. See Finding of Fact No. 93, *supra*.
6. See Finding of Fact No. 91, *supra*.
7. See Finding of Fact No. 85, *supra*.
8. See Finding of Fact Nos. 82, 85, *supra*; PX-30.

96. The non-AMAX shareholders of RST did not receive fair value for the RST assets purchased by AMAX pursuant to the amalgamation.

G. *Disclosure in the Explanatory Materials.*

97. The following facts, which are material and would have a bearing on a prudent man's voting for or against the proposals presented, were not disclosed in the materials sent to the RST stockholders:

(a) the identity and interest of the RST officers and directors who acted on behalf of RST in the negotiations with AMAX; [7]

7. Disclosure is made in the Appendices to the Explanatory Statement of MacGregor's and Donahue's roles on behalf of AMAX. (PX-43, R-4, Finding No. 26). As we will find below, this reference was inadequate. (See Finding of Fact No. 98(d), *infra*).

(b) that the law firm of Sullivan & Cromwell, general counsel to AMAX, represented both RST and AMAX for over thirty-five years, and during the period of negotiations with Zambia, while representing AMAX, advised RST as to the terms of both an agreement with Zambia and a form of reorganization, which included externalization, and had the main responsibility of drafting the agreement with Zambia. (PX-90, PX-107, PX-134, p. 2; DX-50 at pp. 1-3)

98. The following material facts, which would have a bearing on a prudent man's voting for or against the proposals presented, although disclosed, were not fully, fairly and adequately disclosed in that they are insufficiently brought to the shareholder's attention, especially in light of the length, complexity and detail of the Explanatory Statement and Appendices:

(a) the expected benefits AMAX will receive from the amalgamation;

(b) the investment bankers, who advised RST that the amalgamation was fair to all RST shareholders, did not make any independent survey of the RST Group's mining properties, mineral reserves, or exploration rights, and assumed the accuracy of all the information and statements contained in the Explanatory Statement;

(c) the interest of the RST directors, investment advisers, and other principals;

(d) the composition of the AMAX negotiating team.

99. The following facts, which are material and would have a bearing on a prudent man's voting for or against the proposals presented, were not disclosed in the explanatory materials:

(a) under Zambian law, shareholder approval was not required or necessary to effectuate the nationalization of 51% of RST's operating properties in Zambia;

(b) under the terms of the Agreement between Zambia and RST (DX-1), RST had the discretion to transfer its assets to a non-Zambian holding company (*i.e.* "externalize") or to hold its assets in Zambia;

(c) there is no time limit in the Agreement between Zambia and RST (DX-1) with respect to when the externalization of the non-Zambian assets must be accomplished;

(d) that there were alternatives, other than amalgamating with AMAX, available to RST and that, in fact, one such alternative, RST's becoming an international mining house, had been approved by the RST Board (See Finding of Fact Nos. 26, 27 *supra*), and a restructured form of that alternative, the "twinning" plan, was set up as a fallback position if the amalgamation with AMAX were not approved. (See Finding of Fact No. 41(a), *supra*).

100. The explanatory materials, by not disclosing those material facts set out in Finding of Fact No. 99, *supra*, coupled with statements made therein, namely

> "This Explanatory Statement describes the proposal of the RST Board that the shareholders of RST approve this sale to Zimco *as part* of their approval of a reorganization of the structure of the RST Group. . . ." (PX-42, p. 1). (Emphasis supplied)
>
> "At an early stage of this consideration AMAX raised with RST the possibility of an amalgamation of part of the RST Group into AMAX, with a distri-

bution of other RST assets and AMAX securities to the other RST shareholders, as a means of effecting a reorganization to meet the foregoing considerations . . ." (PX-42, p. 2)

"Approval is being sought from RST shareholders of the foregoing proposal as a whole. Under the law of Zambia, this proposal, since it involves a reduction of capital of RST, cannot become effective unless confirmed by the High Court for Zambia after it has been approved by the shareholders of RST by a special resolution . . ." (PX-42, p. 2)

"Accordingly, this distribution will enable such RST shareholders to the maximum extent permitted to continue an interest in the Zambian mining operations directly and subject to generally the same tax laws and treaty considerations as pertain to their present RST shares (See Appendix M) while receiving the other assets being distributed to them free of Zambian exchange control restrictions; and to the extent RST shareholders obtain Amax common stock by exercising the Amax warrants being distributed, they will secure through Amax an interest in such portion of RCM as Amax may then own." (PX-42, p. 4)

"The Board believes that it has a duty to point out to shareholders that, if the Resolutions are not approved by the shareholders, the Board of RST must continue to work with representatives of Zambia for the acquisition by Zambia of a 51% interest in the Zambian mining, smelting and refining operations of its subsidiaries in accordance with the announced policy of Zambia to acquire such an interest.

> The Board believes that the results of such a course would be substantially less in the interests of shareholders than the present proposal." (PX-42, p. 5)

render the Explanatory Statement and Appendices materially misleading in that a shareholder would be led to believe, contrary to actual fact, that the amalgamation with AMAX was an inevitable consequence of the nationalization of RST and was the only possible way of complying with the Agreement between Zambia and RST.

102. The explanatory materials failed to disclose why the proposal to nationalize and the proposal to amalgamate with AMAX were linked for purposes of voting into one shareholder resolution. This material fact would have a bearing on a prudent man's voting for or against the resolution.

103. The manner of presenting the nationalization and amalgamation proposals to the stockholders in the form of a single resolution was itself a manipulative scheme designed to coerce stockholder approval of the amalgamation with AMAX.

104. The Explanatory Statement and Appendices failed to disclose adequately the evaluation given to the RST assets which AMAX acquired and the basis for these evaluations. These facts are material and adequate disclosure of them were necessary for an informed shareholder decision whether to vote for or against the proposals presented.

105. The following statement appears on page 5 of the Explanatory Statement (PX-42):

> "The Board believes that it has a duty to point out to shareholders that, if the Resolutions are not approved by the shareholders, the Board of RST must continue to work with representatives of Zambia for

> the acquisition by Zambia of a 51% interest in the Zambian mining, smelting and refining operations of its subsidiaries in accordance with the announced policy of Zambia to acquire such an interest. The Board believes that the results of such a course would be substantially less in the interests of shareholders than the present proposal."

We find this statement to be materially false and misleading and that it would have a bearing on a prudent man's voting for or against the proposals presented. Although shareholder approval of the nationalization was a term of the Agreement between Zambia and RST (DX-1, p. 2, §3(A)ii), this in no sense meant that RST shareholders could have effectively prevented the 51% nationalization by voting against it, for even had the RST shareholders not "approved" the nationalization, Zambia would have "acquired" the 51% of RST's operating assets notwithstanding. (N. T. F. H. 534-35). Consequently, the only effective purpose for the vote was to decide whether shareholders approved the amalgamation with AMAX.

106. The following statement appears on page 4 of the Explanatory Statement (PX-42):

> "Accordingly, this distribution will enable such RST shareholders to the maximum extent permitted to continue an interest in the Zambian mining operations directly and subject to generally the same tax laws and treaty considerations as pertain to their present RST shares (See Appendix M) while receiving the other assets being distributed to them free of Zambian exchange control restrictions; and to the extent RST shareholders obtain Amax common stock by exercising the Amax Warrants being distributed,

> they will secure through Amax an interest in such portion of RCM as Amax may then own."

We find this statement, which is material and would have a bearing on a prudent man's voting for or against the proposals presented, to be misleading. The language "to the maximum extent permitted" could be interpreted by a stockholder, particularly in light of the failure of the explanatory materials to disclose any alternatives other than amalgamation with AMAX open to RST, to mean that the package proposed to be distributed by AMAX gave them the maximum participation in Zambian mining operations allowable by the agreement with the Zambian government. This was materially misleading because if there were no amalgamation with AMAX the stockholders of RST would have been entitled to their pro rata interest in all of the assets acquired by AMAX, including the disproportionate interest in RCM, the management and sales contract, the Ametalco group and their interest in the miscellaneous assets.

II. Opinion

The issues in this case are:

(1) whether the High Court of Zambia's confirmation of RST's Reduction of Capital on August 14, 1970 bars plaintiffs' claims asserted in Counts I, II, III and V of the Amended and Supplemental Complaint;

(2) whether the amalgamation of AMAX and RST is fair and equitable to all RST shareholders;

(3) whether the Explanatory Statement and its Appendices were false or misleading in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5, promulgated thereunder;

(4) whether plaintiffs have standing to raise alleged violations of Sections 7 and 8 of the Clayton Act and, if so, whether they have proved such violations;

(5) if plaintiffs are entitled to relief on one or more of the grounds, to what relief are they entitled?

(1) *The Effect of the High Court of Zambia's Order*

Defendants have strongly urged upon us the argument that the order of the High Court of Zambia approving RST's Reduction of Capital is a valid final judgment and, as such, should be recognized and given effect as a conclusive determination of plaintiffs' claims concerning the fairness of the amalgamation and the alleged violations of the Securities Exchange Act of 1934. *See* Goodrich & Scoles, *Conflict of Laws* 390 (4th ed. 1964); *Hilton v. Guyot*, 159 U.S. 113 (1895).

On August 14, 1970, the High Court of Zambia found the amalgamation fair to all RST shareholders when it approved the Reduction of Capital. (*See* Finding of Fact No. 52, *supra* and Finding of Fact No. 35 of our Findings of Fact of June 8, 1970). Implicit in this finding of fairness, defendants argue, is a finding that the explanatory materials fully and adequately disclose all material information to the shareholders. Accordingly, plaintiffs are said to be barred before this Court.[7a]

We cannot agree that this Court is foreclosed from inquiring into the fairness of the amalgamation and the alleged Securities Exchange Act violations by the High Court's August 4th Order for the following reasons:

(1) United States Courts have exclusive jurisdiction under the Securities Exchange Act and defendants have

7a. See also the affidavit of David Ffinlo Quirk, an attorney in Zambia, filed September 24, 1970.

not asserted that any similar law exists in Zambia. Accordingly, no finding, especially one that is merely implicit in the High Court's finding of fairness, could bind this Court, at least as to plaintiffs' Securities Exchange Act claims;

(2) The jurisdiction of this Court was invoked first and this Court, prior to the High Court's ruling, by our Order of August 12, preliminarily enjoined the amalgamation, except to allow defendants to seek approval in the High Court of the acquisition by Zambia of 51% of RST. We found that plaintiffs had demonstrated a strong probability that they would succeed in proving the unfairness of the amalgamation and violations of the unfairness of the amalgamation and violations of the Securities Exchange Act of 1934. Hence, as we see it, the burden then shifted to the High Court of Zambia to give recognition to our findings, especially those concerning the Securities Exchange Act.[8] It did not. Under these circumstances, having already made preliminary findings that plaintiffs were entitled to relief, we do not think that a *subsequent* ruling of the High Court of Zambia can prevent us, after further extensive hearings, from making our findings final.

(3) The proceedings before the High Court of Zambia, though on notice, were not in fact adversary and the High Court's Order does not indicate any consider-

---

8. Defendant inform us that the entire record in this case, including apparently our Order of August 12th, was before the High Court before it ruled.

Also, the fact that the Court of Appeals stayed the effect of our preliminary injunction would not cast doubt on our August 12th findings because the Court did not rule at that time on the merits of our findings. Hence, as of August 14, when the High Court ruled, our findings stood undisturbed.

ation of the grave questions of conflict of interest and valuation discussed in this opinion, *infra*.

(2) *The Fairness of the Amalgamation.*

The question of the fairness of the amalgamation raises, under conflict of laws principles, a question under the law of Zambia. Under Zambian law, as in the United States, corporate directors owe a fiduciary duty to the corporation.[9] Similarly, a controlling shareholder owes a fiduciary duty to the non-controlling shareholders.[10] However, under Zambian and prevailing United States law the existence of a fiduciary duty does not prevent a fiduciary from dealing in transactions in which he has an interest adverse to the object of his fiduciary duty as long as, in final analysis, the transaction can be said to be fair. That is, only if the transaction is found to be unfair can a fiduciary be held to have breached his fiduciary duty. (See authorities cited in Defendants' Brief, pp. 7-12). Accordingly, it is defendants' position that the directors of RST who were interested on behalf of AMAX in the amalgamation nevertheless acted properly because the amalgamation was fair to all RST shareholders.

Some courts have, however, taken exception to this "prevailing" view. In *Seagrave Corp. v. Mount*, 212 F. 2d 389 (6th Cir. 1954) the Court held that a corporate fiduciary who placed himself in a position of conflict between his fiduciary obligation and his own private interests is guilty of constructive fraud, even if this "interested" fiduciary

9. See, e.g., *Aberdeen Ry. v. Blarkie*, (1854) 1 Macq. H.L. 461 (H.L.Sc.) L.C.B. Gower, *Principles of Modern Company Law* 526-27 (3d ed. 1969).

10. See, e.g., *Allen v. Gold Reefs of W. Africa* (1900), 1 Ch. 656, 671; *Cook v. Deeks* (1916) 1.A.C. 554, P.C.; Gower, *supra*, at 564-80.

acted in good faith and the transaction was fair. In *Seagrave,* such constructive fraud was found to be sufficient to allow minority stockholders to enjoin a proposed purchase of another corporation.

We believe that this case is a middle ground between *Seagrave* and the so-called prevailing view. Here, where the conflict of interest is so grave and the benefits to one party so great we think that the transaction may be considered, in the circumstances under which it was negotiated, inherently unfair.

Although it seems clear that Sir Ronald Prain did his best to negotiate a fair deal with AMAX, he was bargaining from a position of weakness in a situation which was inherently coercive to him and the public stockholders of RST. In terms of his own board, six were employees and/or directors of AMAX. Vuillequez, the chief negotiator for RST, was a life-long employee of AMAX having started to work for the company at the age of 16 and having become ultimately a director and member of the executive committee on the board of AMAX in 1956. He came to RST in 1964 when the Ametalco group was sold to RST. Vuillequez knew as early as December 1969 that MacGregor and Donahue were determined to have AMAX acquire RST after the nationalization. He thus knew that the overwhelming probabilities were that he would become an employee of AMAX once again. Further, he owned approximately 1 million dollars worth of AMAX stock which was considerably greater than his holdings in RST, which then had an approximate market value of $80,000. In addition, the four RST directors who were also Selection directors must have known that Selection owned 11.8% of AMAX stock. It thus appears that the financial interest of at least nine of the thirteen directors of RST clearly lay in benefitting AMAX rather than the public stockholders or RST,

because they were either AMAX or Selection directors. Further, Vuillequez was one of the remaining four directors who were not AMAX or Selection directors and his interests clearly lay with AMAX. Notwithstanding this, Sir Ronald Prain pursued a plan of internationalizing RST and externalizing its assets with the idea of becoming a United States or Luxembourg company and engaging in international mining operations. The plan was not merely a dream since RST had previously engaged in exploratory activities in Jamaica, Australia and Chile and would have continued these had not the Zambian exchange control prevented them from doing this. Recognizing the potential economic conflict between an "internationalized" RST and AMAX, Prain offered to buy out AMAX's interest in Roan. MacGregor flatly rejected this idea. It seems clear that Sir Ronald pursued the plan of internationalization until February 26, 1970 when at a meeting in New York he was advised by United States tax counsel that although the reorganization based on internationalizing Roan would be tax free to AMAX, it would have resulted in ordinary income to the non-AMAX stockholders if it was coupled with a distribution of the Zimco bonds and a cash dividend. At this point the only viable alternative to Roan was to either have AMAX buy out the public stockholders or have Roan buy out AMAX. A further consideration with respect to internationalizing Roan was the advice received by Rothschild that an internationalized RST would have a borrowing capacity of probably not in excess of 35 million dollars. Since the average cost of putting a new copper mine into production has recently exceeded 200 million dollars, the limitation on its borrowing capacity seemed to be a real bar to Roan's going it alone in the mining field.

The directors of AMAX were able, then, to drive a hard bargain to wash out the public shareholders as cheaply as

possible, while securing for AMAX unique high-yielding assets. It was inherently unfair and therefore a breach of fiduciary duty for the AMAX directors who were negotiating for AMAX and who were RST directors to fail to make good faith efforts to share with the public shareholders of RST their fair share of the unique benefits flowing to AMAX as a result of the amalgamation. MacGregor refused even to discuss a straight equity participation by Roan shareholders in AMAX. Rather, once MacGregor made the decision to acquire RST he was determined to bull it through the stockholders by whatever means was necessary including the coupling of the vote on nationalization with that on amalgamation and writing the explanatory statement in such a way as to make it appear that the public stockholders really had no other alternative.

In piecing together the many bits of evidence throwing light on this question, it seems quite apparent that the real reason that the Roan directors backed themselves into an impossible corner was because MacGregor and the other AMAX related directors would not accept a plan of internationalizing Roan without AMAX being able to either change its position from minority stockholder to majority stockholder or getting out of Roan entirely. MacGregor and Prain and their advisers all felt that since an internationalized Roan would probably be in direct competition with AMAX in international mining ventures, AMAX's position as a 42% stockholder in such a venture would be embarassing if not clearly illegal under the American Anti-Trust laws. It also seems clear that MacGregor very early in the game decided that it was to the benefit of AMAX to be a buyer rather than a seller. Thus it developed that for the ostensible purpose of "externalizing" the assets of Roan for the benefit of the public stockholders the remaining high yielding assets were transferred to AMAX in re-

turn for its subordinated debentures. From Prain's initial determination that the Zimco bonds plus some cash should be distributed to the stockholders and from MacGregor's refusal either to be a part of internationalized Roan or to sell the AMAX interest in Roan all else followed.

In the Court's view, this is a classic case where a dominant minority stockholder was in fact in a controlling position and simply could not deal fairly with the unrepresented majority stockholders no matter how many prestigious outside advisers were brought in to assist in the negotiations.[11] The one thing that the majority stockholders were never asked is whether they would prefer to continue as stockholders of an internationalized Roan rather than as debenture holders of AMAX. There simply did not exist in the entire negotiating structure a single person who could speak exclusively on behalf of the majority stockholders and as a consequence this fundamental question was never put to the stockholders.

Indeed, it even appears that the negotiations with the Zambian Government were conducted in such a way as to make it impossible to submit any alternative plan of externalization at the meeting called to pass upon the nationalization. In this connection it should be noted that the record never clearly gave a satisfactory answer as to why the stockholders were asked to vote on nationalization. Sir Ronald Prain's uncontradicted testimony was that no stockholders' approval was necessary under Zambian law to effectuate the nationalization of 51% of Roan. Considering the negotiations in the light of MacGregor's determination to acquire Roan, it seems clear that the reason stockholders'

11. The fact that MacGregor could so flatly foreclose discussion on the RST proposal that RST buy out AMAX is a clear indication that AMAX dominated the negotiations and that RST was in a difficult bargaining position because of AMAX's domination. See also, PX-5, App., p. 10.

approval was negotiated by Roan in the agreement with Zambia was to lay the groundwork for the assertion which later appeared in the Explanatory Statement that a vote against the planned amalgamation would require a re-negotiation of the deal with the government of Zambia, which might result in less favorable returns for the public stockholders. This, in turn, was used as the basis for coupling in a single vote the nationalization with the amalgamation.

From the record before this court, it is clear that the only fair method of presenting the question of nationalization and its consequences to the non-AMAX shareholders would have been, at the very least, to have presented them with a choice as between internationalization of Roan and amalgamation with AMAX. The reason this choice was never presented to the non-AMAX shareholders was because of AMAX's domination of Roan and its determination to acquire the remaining assets of Roan by whatever means necessary.

It may be observed in passing that even if the alternatives had been fairly presented in a statement which gave all the information necessary to make an intelligent choice, that this in itself might not have cured the vice inherent in this situation. This is true because even in such a case one of the alternatives, i.e., the amalgamation with AMAX, would have been negotiated with persons dominated by AMAX and therefore possibly not representing the best price that could be gotten from AMAX by persons whose only loyalty was to the non-AMAX shareholders. In any event, it is clear that what happened here cannot be allowed to stand since it was the domination and determination of AMAX to coerce the Roan board to negotiate exclusively on the subject of amalgamation and the evidence indicates, as will be explored *infra*, that the price negotiated was the lowest possible price that could be negotiated. The only truly fair

deal would have been to allow the public shareholders to share in the unique benefits flowing to AMAX through some form of equity participation and it was precisely this that MacGregor firmly refused even to discuss.

As expressed by then Chief Justice Cardozo of the Court of Appeals of New York in *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545, 546, 62 A. L. R. 1:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions".

MacGregor and the other AMAX directors of Roan did not seem to realize that their conduct was governed by the standards of the above-quoted language in connection with their *independent* fiduciary duty to Roan. As MacGregor stated to the Court in our preliminary hearing "I have only one company, American Metal Climax". (N. T. P. H. 386).

Further, even if this amalgamation were not considered inherently unfair, the evidence reveals that it is in fact unfair. The burden of proving fairness is on the fiduciary. Although defendants argued, on the basis of one early British case[12] and several United States decisions, that

12. *Shuttleworth v. Cox Bros. & Co.* (1927) 2 K. B. 9, 18 C. A.

shareholder approval has shifted the burden, we have found that the burden of proving fairness rests on defendants notwithstanding such shareholder approval for the following reasons. First, there is authority that shareholder approval does not shift the burden of proof. See *Green v. Dunhill*, 249 A. 427 (Del. Ch. 1969). Secondly, and more importantly, shareholder approval in this case is vitiated because, as we have found (Findings of Fact Nos. 97-106), and will discuss below, the explanatory materials violated the Exchange Act of 1934. In this situation, the shareholders cannot be said to have made an informed decision. Accordingly, defendants' heavy burden does not shift.

Before turning to an analysis of fairness, we believe that it is necessary to first inquire into the nature and degree of the fiduciaries' self-interest in this case because such an inquiry is relevant in judging fairness. The more interested a fiduciary is, the greater the burden upon him to show that he has not breached his fiduciary duty. With this in mind, we turn to an analysis of the nature of the interests of the fiduciaries involved.

The first question in this regard is whether AMAX controls RST. If it does, then there are two fiduciary relationships involved in this case, namely the duty owed by the directors of RST to RST and the duty owed by a controlling shareholder to the non-controlling shareholders.

We have found that AMAX controls RST and we have done so for two reasons. First, AMAX owned 42.3% of RST and this in itself constituted practical or working control of RST. A shareholder need not own 51% of a company in order to control it. *SEC v. Holman & Co.*, 377 F. 2d 665 (2nd Cir. 1967); *Essex Universal Corp. v. Yates*, 30 F. 2d 572 (2d Cir. 1962); *Perlman v. Feldman*, 219 F. 2nd 173 (2nd Cir. 1955); *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22 (E. D. Pa. 1940). Secondly, 10

of 13 RST directors were AMAX controlled or interested because they were either also directors of AMAX or Selection, or were past employees of AMAX. (See Findings of Fact Nos. 53-71). Under these circumstances we have concluded that AMAX controlled the Board of Directors and this, coupled with its 42.3% stock ownership, constituted control of RST.

The second fiduciary obligation involved is the one owed to RST by the individual RST directors. The nature and extent of this interest is as follows. The 6 RST directors who are also AMAX directors own substantial holdings in AMAX and 3 of these men actually negotiated the amalgamation with RST on behalf of AMAX—MacGregor, Donahue and Harold Hochschild. Harold Hochschild is one of the largest individual shareholders in AMAX, if not the largest, Donahue is President of AMAX and MacGregor is Chairman of the AMAX board and its Chief Executive Officer. One of the 6—Wharton-Tigar—is also a Selection director and owns Selection stock. (Selection, owns 11.8% of AMAX. See Finding of Fact No. 54). Of the RST directors who are not also AMAX directors, 3 are also Selection directors and own Selection stock. Prain, RST Chairman, is one of these Selection directors and owners. Vuillequez, one of the negotiators on behalf of RST, has a long history of AMAX connection, and was for 7 years an AMAX Director. As indicated earlier, he owns 26,169 AMAX shares, worth approximately $1 million. Further, Rothschild & Sons, who were hired by RST to advise it in its negotiations with AMAX, owned 126,000 shares of Charter. (Charter owns 27% of Selection. See Finding of Fact No. 55). The extent of these fiduciaries interest, then, is extremely great. (See generally Findings of Fact Nos. 53-71). They are interested for AMAX because of their corporate relationship to AMAX and/or Selection and they are interested for themselves because of their extensive personal holdings in

AMAX and/or Selection. This by itself, not to mention AMAX's control position in RST, imposes in our view a very high degree of fiduciary duty and, therefore, a very heavy burden of proof. The fairness of the amalgamation can only be viewed against the background of this extensive self-interest on behalf of AMAX and certain RST directors.

The question whether this transaction was fair hinges on whether the AMAX debentures, valued at $76.2 million, was fair value for the RST assets, valued at $75.2 million, which AMAX acquired from the non-AMAX stockholders. In resolving this question, as we have noted, the burden of proof is on the defendants.

We have concluded that defendants have failed to meet their burden. Plaintiffs have come forward with evidence that the value paid by AMAX was unfair in two regards. First, we have found that the AMAX debentures were overvalued by RST's investment advisers. (See Finding of Fact No. 75). It is clear that the advisers were unsure of how to value the debentures and guessed their value to be between $98 and $100. There is also evidence that the day before the amalgamation was finalized, the debentures were valued at $93 by the advisers. (See Finding of Fact No. 76). Nevertheless, the RST advisers ascribed to the AMAX debentures the highest value. In this connection it is important to note that for every $1 less than $100 the debentures were valued, the value of the debentures on the whole decreased by over $750,000. It is up to defendants then to justify ascribing the higher value to the debentures and we have not been persuaded on the evidence that the higher value has been justified.

Secondly, plaintiffs have come forward with evidence that RST's advisers did not fairly value the RST assets acquired by AMAX. (Finding of Fact No. 80). Generally, in viewing the evidence as a whole, it appears that each of the RST assets was ascribed a range of values during the

period of negotiations and almost in every case, by March 5, 1970, the finally negotiated value was the lowest value.

First, there is clear evidence that the actual valuation ascribed to the so-called miscellaneous assets, including Fiji and Baluba, $20 million, was too low. On January 9 and 10, these same assets were valued at $33 to $50 million by Rothschild. The two particular components of these miscellaneous assets in question here, the Fiji exploration and the Baluba orebody, were clearly undervalued. The advisers valued these assets by the amounts actually expended by RST on these projects up to December 31, 1969. With respect to Fiji, this was $600,000. However, further expenditures for this project for 1970 of $350,000 were authorized and $165,000 was authorized to finance the purchase of additional areas in Fiji. If Fiji is to be valued by a measure such as actual expenses up to December 31, 1969, there is no reason why these additional authorized expenditures should not also be included in valuing it. Also, the measure of "actual expenses" placed no value on Fiji's potential as a valuable source of minerals. It was reported to RST, in a preliminary survey, that Fiji did appear to contain valuable resources sufficient to justify further exploration. In the explanatory materials, RST admits Fiji's value could be very high. On January 9-10, Prain, on the basis of the above preliminary study, valued Fiji at $25 million and at this same time Rothschild valued it at $15-$20 million. These facts lead us to conclude that Fiji was undervalued. Its value should have included the further authorized expenses and some amount for what appears to be a bright future. (As to Fiji, see Findings of Fact Nos. 83-84).

As to Baluba, this orebody was valued by the advisers at $4 million, again using the measure of actual expenses up to December 31, 1969. However, during the first quarter of 1970 an additional $2.16 million was actually expensed in

Baluba. In addition, on January 9-11, RST valued Baluba as high as $8 million and at that time Rothschild and AMAX tentatively agreed that Baluba was worth $6 million. Moreover, it appears that the Baluba operations will be made profitable by 1974. (See PX-43, I-I and Finding of Fact No. 88). As compared to AMAX's Puerto Rican venture, Baluba appears to be a more valuable undertaking (See Findings of Fact Nos. 88-89). These facts lead us to conclude that Baluba was undervalued by at least $2 million. (As to Baluba, see Findings of Fact Nos. 84-88).

Also, the evaluation of Fiji and Baluba by the RST advisers are subject to serious question because the advisers assumed the accuracy of all information and statements in the explanatory materials and made no independent survey or appraisal of RST's mining operations, mineral reserves and exploration rights. (See Finding of Fact No. 81). In light of the extensive conflict of interest in AMAX and RST directors in this case, and since *the* most important aspect for valuing a mining company such as RST is its mining properties, mineral reserves and exploration rights, of which these miscellaneous assets were comprised, and since the advisers have valued Fiji and Baluba at such widely disparate values, the advisers to RST should have made an independent analysis and should not have relied on RST so extensively.

In conclusion, then, plaintiff has shown us clear evidence that the so-called miscellaneous assets, especially Fiji and Baluba, were valued too low and defendants have failed on the evidence to offset this clear evidence.

Second, with reference to the other RST assets, the plaintiffs' evidence raises serious question in our mind whether the evaluations finally ascribed to each was fair and defendants have not persuaded us to the contrary. Hence, we cannot conclude that the valuations were fair.

(A) *RCM.*

With reference to the valuation of the public's share of RCM acquired by AMAX, the evidence shows that it was valued on January 10, 1970 by Rothschild at $126 to $202 million. (Finding of Fact No. 89). However, on March 5, 1970, AMAX's share of RCM was finally given the value of $120. (Findings of Fact Nos. 72, 88). The conflict in valuations arises from a conflict in the price earnings multiple to be assigned to RCM and defendants have not persuaded us that the lower multiple is the fair one.

(B) *Management Contract.*

This was finally valued by the advisers at $12.5 million or five times the estimated annual earnings of $2.5 million. On this basis the 57.7% interest to be acquired by AMAX was valued at $7.2 million. (Finding of Fact No. 91). However, since the management contract was for a minimum duration of 10 years, it would appear to be just as reasonable to value this asset at ten times earnings and defendants have not persuaded us that the basis of five times earnings is a fair one. In fact, in late January AMAX valued its 57.7% interest in the management contract at $9 million and Rothschild evaluated it at $11.6 million. (See Finding of Fact No. 91).

(C) *Ametalco.*

On the basis of Findings of Fact Nos. 92-94 we have a serious question whether Ametalco was fairly valued. Ametalco was valued at $13 million as a whole and AMAX's acquisition of 57.7% was therefore assigned a value of $7.5 million. The basis of this evaluation was five times estimated annual earnings. However, AMAX, both before and after Zambia's decision to nationalize 51% of RST, valued RSTIM, 90% of whose earnings consists of Ametalco's earnings, at a price earnings multiple of 8 to 10 times

average earnings of $2.9 million. On January 10, 1970, Rothschild valued RSTIM between 7 and 10 times $2.3 million. Again, defendants have not persuaded us that the value finally ascribed to Ametalco was fair in light of these very high evaluations of RSTIM.

Cutting through to the essence of the evaluation of RST's assets, it is clear that the assets were valued within a range of values from about $490 million to $303 million and that in each case the final value was in the lower part of the range, if not the lowest. (Finding of Fact No. 95). In almost every case, the defendants have failed to persuade us that these finally negotiated values were fair.

Concluding, then, we believe that the underevaluation of Fiji and Baluba by itself and especially when coupled with the overvaluation of the AMAX debentures, and the failure of defendants to persuade us as to the evaluations of certain other RST assets renders the amalgamation unfair to the non-AMAX RST stockholders in view of defendants heavy burden of proof in this regard. Also, we believe the evidence is so strong that even if the plaintiffs had the burden of persuasion in this case, we would find that the evidence sustains that burden.

(3) *Violations of the Securities Exchange Act.*

Section 10(b) of the Securities Exchange Act, 15 U. S. C. § 78j, provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in con-

travention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, promulgated under Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

"(a) to employ any device, scheme or artifice to defraud,

"(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

It is now axiomatic, and not contested by the defendants, that an exchange of stock in a merger or similar context, here the amalgamation of RST and AMAX, falls within the protective ambit of Section 10(b) and Rule 10b-5, *SEC v. National Securities, Inc.*, 393 U. S. 453, 567-569 (1969); *Swanson v. American Consumer Industries, Inc.*, 415 F. 2d 1326, 1330 (7th Cir. 1969); *Nader v. Armel*, 402 F. 2d 158, 160-161 (6th Cir. 1968); *Dasho v. Susquehanna Corp.*, 380 F. 2d 262, 267-269 (7th Cir. 1967), *cert. denied* 389 U. S. 977 (1967); *Vine v. Beneficial Finance Co.*, 374 F. 2d 627, 634-635 (2d Cir. 1967), *cert. denied* 389 U. S. 970 (1967).

Measuring the Explanatory Statement and Appendices by Section 10(b) and Rule 10(b)-5, we find that it is fatally defective in that it contains material omissions of fact necessary to be stated to make the statements made not misleading and in many cases fails to fully, fairly and adequately disclose material facts.

The Explanatory Statement was materially misleading in that it was designed to persuade the shareholders that the amalgamation with AMAX was an inevitable consequence of the nationalization of RST. The purpose of this was to prevent the stockholders from making an informed judgment as to whether they should amalgamate with AMAX or externalize RST on some other basis. Since this was the pivotal decision for the future of the company, the failure to disclose to the stockholders that they had this choice was a material and fatal omission in the Explanatory Statement under federal securities laws.

It is clear that under the terms of the Agreement with the Zambian Government (DX-1), RST had the discretion to transfer its assets to a non-Zambian holding company or to hold its assets. (DX-1, p. 5). It is further clear that there is no time limit in the Agreement with Zambia with respect to when the externalization of the non-Zambian assets must be accomplished. The relevant language of the Agreement is as follows:

> "At the *discretion* of RST the transfer of all or part of the assets of RST (which shall include its 'B' shares of OPCO [RCM] to a new international non-Zambian holding company (hereafter called 'NEWCO') in exchange for shares in such holding company to be issued to the RST shareholders or as may otherwise be decided, all of such assets to be free of any Zambian exchange or other controls. At the *discretion* of RST, all or part of such transfers may be made to share-

holders of RST rather than to NEWCO . . ." (DX-1, p. 5) (emphasis supplied)

Under Zambian law, stockholders' approval was not necessary to accomplish the Zambian Government's nationalization of 51% of the operating assets of RST. The record also shows that as late as March 4, 1970, the RST Board was still considering a plan to externalize its assets by becoming an international company as an alternative to the amalgamation with AMAX. (See Finding of Fact No. 41(a)). Nor is there any dispute that if RST had pursued this plan all of the requirements of the Zambian Government would have been satisfied.

In the light of these facts, the Explanatory Statement was materially misleading. The Explanatory Statement begins by suggesting that approval by the shareholders was necessary to accomplish the nationalization. Thus, on page 1 of the Explanatory Statement (PX-42), the following language appears:

"This Explanatory Statement describes the proposal of the RST Board that the shareholders of RST approve this sale to Zimco *as part* of their approval of a reorganization of the structure of the RST Group . . ." (emphasis supplied).

This language clearly suggests that the stockholders' approval was necessary for the sale to Zimco. On page 2, after describing the arrangement with the Zambian Government, the following language appears:

"At an early stage of this consideration, AMAX raised with RST the possibility of an amalgamation of part of the RST Group into AMAX, with a distribution of other RST assets and AMAX securities to the other RST shareholders, as a means of effecting a reorganization to meet the foregoing considerations. . . ."

In the context in which it appears, this sentence suggests that the amalgamation with AMAX was proposed as a means of effecting a reorganization meeting the requirements of the Zambian Government.

The linkage between the Zambian Government proposal and the amalgamation in the mind of the reader is further reinforced by the following language appearing on page 2:

> "Approval is being sought from RST shareholders of the foregoing proposal as a whole. Under the law of Zambia, this proposal, since it involves a reduction of capital of RST, cannot become effective unless confirmed by the High Court for Zambia after it has been approved by the shareholders of RST by a special resolution . . ."

The concept that the present proposal was required by the Agreement with the Zambian Government and gave the stockholders the maximum interest that they would be permitted by the Zambian Government to continue to have in the Zambian mining operations was further suggested in the language appearing on page 4:

> "Accordingly, this distribution will enable such RST shareholders to the maximum extent permitted to continue an interest in the Zambian mining operations directly and subject to generally the same tax laws RST shares (See Appendix M) while receiving the other assets being distributed to them free of Zambian and treaty considerations as pertain to their present exchange control restrictions; and to the extent RST shareholders obtain Amax common stock by exercising the Amax Warrants being distributed, they will secure

through Amax an interest in such portion of RCM as Amax may own." [12a]

The inter-dependency of the transaction is further reinforced by the language appearing on page 5:

"The Board believes that it has a duty to point out to shareholders that, if the Resolutions are not approved by the shareholders, the Board of RST must continue to work with representatives of Zambia for the acquisition by Zambia of 51% interest in the Zambian mining, smelting and refining operations of its subsidiaries in accordance with the announced policy of Zambia to acquire such an interest. The Board believes that the results of such a course would be substantially less in the interests of shareholders than the present proposal." [12b]

The above-quoted statements are materially misleading because their calculated and designed effect was to persuade the stockholders that the amalgamation with AMAX was an inevitable consequence of the nationalization of RST and was the only possible way of complying with the Agreement between Zambia and RST and at the same time maintain for the non-AMAX stockholders, their maximum allowable interests in the Zambian mines. The true facts, which were known to all of the members of the RST Board, were that the Agreement with the Zambian Government was completely independent of the Agreement with AMAX and did not require stockholders' approval; that the provision for externalization did not require immediate externalization and required no Agreement with AMAX; that the RST Board of Directors had approved a plan for externalization

12a. See Finding of Fact No. 106, *supra.*

12b. See Finding of Fact No. 106, *supra.*

under the terms of which RST would become an international mining company and would remain independent of AMAX; and that the defeat of the single proposal could not change the terms of nationalization, but would only require a new plan for externalization and that such a plan was available.

To a sophisticated investor, having an encyclopedic knowledge of everything contained in the Explanatory Statement and Appendices, each of the above statements might be understood to be literally true. But not even the most spohisticated investor would be likely to glean from these materials that nationalization did not in any real sense require stockholder approval, and that the effect of defeating the Resolution would not be to prevent nationalization or substantially alter its terms. Further, not even the most sophisticated investor could, through reading the materials sent to stockholders, understand the true basis for the RST directors' decision to amalgamate with AMAX as opposed to other alternatives. Finally, even if it be argued that each of the above statements were literally true, literal truth is not a defense where the general effect of the explanatory materials is to mislead.

In addition to making statements calculated to lead the stockholders to believe that the amalgamation with AMAX was the inevitable result of the nationalization, the defendants designed the instruction form (PX-44) to the shareholders in such a way that a shareholder was required either to vote for or against both nationalization and amalgamation in a single vote. This made it physically impossible for a stockholder to vote in favor of nationalization and against amalgamation. When this question was first presented to the Court at a preliminary hearing, the Court declined preliminary relief on the ground that the manner in which the issues were to be presented to the stockholders

was a question of business judgment for which the Court would not substitute its own judgment. After having heard all of the testimony and reviewed all the exhibits, the Court has concluded, however, that the manner of presenting the proposals to the stockholders was itself a manipulative and deceptive device designed to reinforce the concept that nationalization and amalgamation were inextricably intertwined and to coerce the stockholder who felt that he had no choice as to nationalization to vote in favor of the amalgamation.

Further, even if the joining of the amalgamation and nationalization proposals into one resolution were not considered to be a manipulative scheme, the failure of the Explanatory Statement to set forth the reasons for such a presentation is a material omission. For example, a shareholder who wanted to vote in favor of one and against the other would want to evaluate the reasons for joining the two proposals. If he thought the reasons were valid and justified, he might vote in favor of both proposals, and vice versa. It is interesting to note that the defendants, at trial, went to great lengths to convince the Court that the joining of the two proposals into one resolution was founded on sound judgment (See N. T. F. H. 591-93, 769-71, 1367-70), but no such explanation was provided the RST shareholders.

In addition to the foregoing materially misleading statements and omissions, the Explanatory Statement fails to explain to the stockholders the course of the negotiations between AMAX and RST and the basis of evaluation of the assets which AMAX acquired from RST. In this connection, it is most significant to note that during the course of the negotiations, as to every asset which had a range of values assigned to it by either AMAX, RST or their advisers, at the conclusion of the negotiations, the value accepted as a basis for the transaction was invariably on the lower range. (See Finding of Fact No. 95, *supra*). A

clear presentation of the values assigned the RST assets (such as DX-43, II, which the defendants prepared for purposes of litigation) and the basis upon which the evaluations were made were crucial to an informed shareholder vote, and the omission of these facts from the explanatory materials was material.

In addition to the above, the Court has found the following violations of the Securities Exchange Act.

A. Omitted Facts.

(1) *Identity of RST Directors Who Negotiated with AMAX.*

In view of the extensive conflict of interest on the part of RST directors it would be very important for the shareholders to know who negotiated with AMAX for RST. Vuillequez and Prain's extensive connection with AMAX and/or Selection makes it essential that the shareholders know not only the nature of those connections but also that these were the very men who represented them in RST's negotiations with AMAX. The failure to include this must be considered a material omission.

(2) *The Involvement of Sullivan & Cromwell.*

Sullivan & Cromwell represented both AMAX and RST for 35 years, advised RST in its negotiations with the Zambian Government and continued to represent both AMAX and RST even after the amalgamation was proposed. (Findings of Fact Nos. 19, 71). Sullivan & Cromwell thus placed itself in a clear position of conflict of interest. Though this position is sought to be justified because the RST directors agreed to allow Sullivan & Cromwell to continue to represent it notwithstanding the conflict, such agreement is meaningless in view of AMAX's control

of RST and the RST Board. Nevertheless, even assuming that Sullivan & Cromwell could continue to represent both, their position is a material fact which should have been disclosed to the shareholders. It would be important for shareholders, in evaluating the advice of RST directors to vote in favor of the amalgamation, to know that through December, 1969 RST was being advised by lawyers who were also advising AMAX.

B. "Buried" Facts.

The Securities Exchange Act requires more than disclosure, it requires adequate disclosure. The more material the facts, the more they should be brought to the attention of the public. To view it otherwise would be to invite frustration of the policies underlying our disclosure laws. Accordingly, we have found certain facts to be "buried" in the explanatory materials. These facts should have in some way been highlighted to insure that the shareholders were aware of them. We need not speculate as to how this should have been done. One obvious does, however, come to mind, namely, these facts could have been placed on the cover page in bold-face type. Nevertheless, their present location is not justified by their importance, especially in view of the length and complexity of the explanatory materials.

(1) *The Benefits to AMAX.*

This is an especially crucial fact in view of the conflict of interest which existed between RST and AMAX on the part of certain RST directors. There are references to these benefits in the explanatory materials (see defendants' brief, p. 46) and the letter from plaintiff Kohn to the shareholders included with the explanatory materials also refers to these bentfits. (Court Exhibit No. 2). In our view, these references do not adequately highlight the benefits and

Kohn's letter would not overcome this deficiency because of the context in which it was sent, *i.e.*, a statement from a dissident shareholder who is attempting to enjoin AMAX from amalgamating with RST. It is defendant RST's responsibility to disclose adequately all facts and disclosure by RST would likely have greater weight in the mind of a shareholder than a disclosure by a dissident shareholder.

(2) *The Investment Advisers' Failure to Make an Independent Analysis.*

As we have noted above in the section on fairness, it is important in evaluating Baluba and Fiji to realize that no independent survey of these areas were conducted by RST investment advisers. This fact was disclosed at pages Q-1 and Q-2 of the Appendices to the Explanatory Statement. It is important to note that pages Q-1 and Q-2 are approximately pages 175 and 176 of 200 pages of materials. It is also important to note that on page 2 of the Explanatory Statement, in bold-face type, there appears the investment advisers opinion that the transaction was fair. At that point the stockholders are only referred generally to Appendix Q where there is a copy of the Advisers' opinion. This does not sufficiently highlight this fact. As we have pointed out, *supra*, the evaluation of the RST assets, especially Fiji and Baluba, was crucial in this case. The RST assets were assigned such widely disparate values and were finally valued so low within that range that the shareholders had a right to know the basis upon which the investment advisers made their evaluations.

(3) *The Conflict of Interests of the RST Directors, Advising Bankers and Others.*

These facts are disclosed in the Explanatory Statement and Appendices but are insufficiently disclosed. These facts

are so important that they should have been highlighted, even if only by a statement on the cover of the explanatory materials that a majority of RST directors have a conflict of interest in the transaction, because of their connection with AMAX or Selection.

(4) *The Identity of the Amax Negotiating Team.*

Important in connection with knowing the extent of the conflict of interest among certain RST directors is knowing their role in the negotiations with AMAX. The fact that certain RST directors negotiated for AMAX was disclosed only in our June 8 opinion which was made an Appendix to the Explanatory Statement and such a disclosure is insufficient.

In conclusion, for the foregoing reasons, we hold that the Explanatory Statement and Appendices are violative of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder because it fails to disclose all material facts adequately, contains material misrepresentations of fact and omits to state facts necessary to be stated to make the statements made not misleading.

(4) *Do Plaintiffs Have Standing to Raise Alleged Violations of the Antitrust Laws and, if So, Have Plaintiffs Proved Such Violations?*

While we have serious reservations whether plaintiffs have shown any "injury" within the meaning of Section 4 of the Clayton Act, 15 U. S. C. § 14, sufficient to confer standing upon them to raise the alleged antitrust violations, we do not believe, on the basis of the record before us, that such violations have been proved.

Plaintiffs rely heavily on expert testimony in order to show that the amalgamation of AMAX and RST and the

alleged interlocking of directorates violates sections 7 and 8 of the Clayton Act, respectively. The expert testified that competition would be adversely affected by AMAX's acquisition of RST. However, he gave no consideration to the fact that AMAX already owned 42.3% of RST and that its net holdings after RST's nationalization would in fact be reduced. Rather, he testified on the basis of a hypothetical situation, treating AMAX as owning no part of RST. Although plaintiffs' attempt to overcome this defect by arguing that AMAX's acquisition of Ametalco and its ownership through RST International of the managing contract will in particular have a tendency to substantially lessen competition, this conclusion is not supported by this record. Thus, we have decided that plaintiffs have failed to sustain their burden of proving any lessening of competition.

(5) *Remedy.*

The most troublesome problem the Court has had with this case is the question of remedy. If the effect of the preliminary injunction earlier issued had not been stayed it would have been a relatively simple matter to enter a final order permanently enjoining the amalgamation on the basis disclosed in the explanatory statement. This remedy does not seem feasible now since the effect of the order of the High Court of Zambia has been to cancel all of the shares of RST held by stockholders other than AMAX. This court, of course, has no jurisdiction over the High Court of Zambia and even though it could enter an order requiring AMAX to petition the High Court of Zambia to enter an order reversing its previous order, there is no assurance that the court would do so. Further, the remedy of total rescission at this time may not be appropriate since events occurring after the amalgamation have adversely affected

RST. First, the world copper price has declined from approximately 79 cents on March 5, 1970 to approximately 49 cents in late October. This, of course, will have a direct impact on RCM's future earnings and will also adversely affect the earnings of RST, International since its profits are derived from RCM and from the management contract and the Ametalco group, all of whose earnings are related to the copper price. Further, since the amalgamation, the Mufilira mine which accounted for about half of RST's production and about 60% of its profits was flooded on September 25, 1970 and its production has been completely shut down.[13] Because of this RCM passed its second quarter dividend. These two factors make it clear that the value of an RST share today must be less than it was on March 5, 1970 before the decline of the world copper price and the mine disaster. Hence, an order requiring complete rescission might simply result in these losses, arising from superseding events, being shifted from the wrongdoers to the wronged.

The Court has also given serious consideration to awarding money damages to the plaintiffs. The very factors that led the court to conclude that the defendants had not carried their burden of proving the fairness of this transaction makes the court conclude that it would be difficult, if not impossible on the present record, to determine a precise dollar figure for the value of RST as of March 5, 1970. In this connection, it should be pointed out that the ten million dollars now being held as security for injury to the plaintiffs (which represents the approximate evaluation of

13. The market has reacted to the Mufulira disaster by discounting the price of RCM's stock by almost 50% since September 24, 1970. The day before the Mufulira disaster RCM was trading at approximately 6.60 a share, which is the highest price it has ever reached. On October 24, 1970, a month after the Mufulira disaster, RCM was trading at about 3.54 a share.

AMAX's disproportionate 4½% interest in RCM) might not be sufficient if in fact Baluba and Fiji are worth many times more than their book value on March 5th and if the proper earning multiple for RCM, Ametalco and the management contract should be significantly greater than 5.[14]

Under all the circumstances, the court has concluded that the only appropriate remedy is to enter an order requiring AMAX to tender to the former shareholders of RST shares of stock in RST International, Inc. representing their pro rata holdings in RST before the amalgamation. In effect, the order will require AMAX to make a public offering to the former shareholders of RST of 57.7% of RST International. Such an offering probably will have to be accompanied by a registration statment with the Securities and Exchange Commission and in any event will be required by this court to be accompanied by an explanatory statement which fully and fairly discloses all the relevant considerations to the stockholders. It will also require AMAX to use its best efforts to cause a public market to be made in the securities of RST International so that the liquidity of the former stockholders of RST will not be adversely effected by their acceptance of the tender. The terms of the tender of course will require the stockholders to tender to AMAX the package including the cash, the Zimco bonds, etc., in return for their shares in RST International.

Such an order has the virtue at least of giving the public stockholders who owned the majority of this company the right to make the choice which should have been given to them when they were asked to vote on this transaction. The principal problem with such an order is that it appears that the public stockholders of RST International will not have the same tax benefits which they had as stockholders of

14. It may be that the Court will require, should it eventually be required to assess damages, the assistance of an independent evaluation of RST's assets, especially of Fiji and Baluba.

RST. The court will, of course, entertain any proposal by which these benefits can be preserved but if that is not possible the court has concluded that it should leave to the stockholders the decision as to whether they want to become equity holders in RST and pay tax on its dividends at ordinary income rates or whether they prefer to accept the "package" at capital gain rates.[15]

The details of such an order will undoubtedly raise many questions which will have to be passed upon by the court. In view of the deadline for a decision in this case set by the Court of Appeals for the Third Circuit, the court has concluded that it will enter this general order at the present time leaving until after any appeal from its decision the details of implementation.

Since the sending out of the letters of transmittal by Morgan to the American stockholders will only add further confusion to an already confused market, this court will herewith permanently enjoin AMAX from causing Morgan to send out such letters until the conditions necessary for the tender ordered herein are complied with. Further, since an appellate court might conclude that damages is the appropriate remedy in this highly complex and difficult situation AMAX will be enjoined from withdrawing from the court the ten million dollars security heretofore entered.[16]

III. Conclusions of Law.

(1) The High Court of Zambia's confirmation of RST's Reduction of Capital on August 14, 1970, does not bar plain-

---

15. It should be noted that the possibility of ordering the so-called twinning proposal as the remedy in this case is no longer viable since RST has been dissolved as a Zambian corporation.

16. By agreement of counsel the issue of defendants' liability for counsel fees has been severed from the case-in-chief, to be determined on notice and hearing after the disposition of any appeal from this decision.

tiffs' claims asserted in Counts I, II, III and V of the amended and supplemental complaint.

(2) The amalgamation is unfair to the non-AMAX shareholders.

(a) AMAX controls RST, owes the non-AMAX shareholders a fiduciary duty, and breached that duty;

(b) Vuillequez, Prain, MacGregor, Donahue and Harold Hochschild owed a fiduciary duty to RST and they breached that duty;

(c) the burden of proving the fairness of the amalgamation is on defendants and they have failed to sustain that burden;

(d) even if the burden of proof were on the plaintiff, he has met his burden of proving unfairness.

(3) The Explanatory Statement and its Appendices violate the Securities Exchange Act of 1934, 15 U. S. C. § 78j, and Rule 10b-5 promulgated thereunder.

(4) Plaintiffs have not proved any violation of the Antitrust laws.

IV. Order.

And now, this 25th day of November, 1970, in accordance with the foregoing Findings of Fact, Opinion and Conclusions of Law, it is Ordered:

(1) that defendant AMAX offer to the non-AMAX shareholders of defendant RST, Ltd., a pro rata share in defendant RST, International in accordance with each shareholder's holdings in defendant RST, Ltd., as of March 5, 1970;

(2) that defendant AMAX take all necessary steps to implement the above offer, including but not limited to,

further hearings before this Court or any other United States or foreign Court, hearings before United States or foreign governmental agencies, and the drafting of a document to disclose fairly and adequately all the relevant considerations to shareholders in connection with this offer;

(3) that defendant AMAX use its best efforts to cause a public market to be made in the stock of defendant RST, International;

(4) that defendant AMAX be enjoined from causing Morgan Guaranty Trust Co. to mail to shareholders the letters of transmittal referred to in the August 31st Order of the Court of Appeals;

(5) that defendant AMAX be enjoined from withdrawing from the Court the $10 million dollars in security it has heretofore entered; and

(6) that, except where otherwise ruled upon in our Opinion, *supra*, the parties' cross motions to strike be, and the same are hereby, DENIED.

/s/ THOMAS A. MASTERSON,
J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CLASS ACTION
CIVIL ACTION NO. 70-933.

HAROLD E. KOHN, TRUSTEE, ET AL.,
Plaintiffs,

v.

AMERICAN METAL CLIMAX, INC.

AND

ROAN SELECTION TRUST, LIMITED, ET AL.,
Defendants.

MASTERSON, *J.* January 15, 1971.

MEMORANDUM AND ORDER AMENDING JUDGMENT.

Plaintiffs have moved to amend the judgment entered in this case on November 25, 1970. The Court has concluded that the judgment should be amended to require AMAX to ensure that the non-AMAX RST shareholders receive the dividends and interest which have accrued to date and which may accrue in the future. We have also amended the Order to make it clear that all expenses arising out of the amalgamation should be assessed as damages against AMAX. Since the precise amount of these damages cannot be determined until after the conclusion of the litigation, an accounting of these damages must necessarily await the

final disposition of all appeals from this Court's Order. These damages will be assessed at the same time as the determination of the issue of counsel fees, which issue was severed for disposition after all appeals by agreement of counsel.

Further, the remedy outlined in our Order of November 25, 1970 will be amended in accordance with the following discussion. As was indicated in our earlier Opinion, the most difficult aspect of this case has been the question of remedy. The remedy ordered on November 25, 1970, the tender to the non-AMAX shareholders of their pro rata share in RST International, does not put the RST shareholders in the same position as they would have been had the amalgamation been restrained since it appears that the non-AMAX shareholders will not be able to use the tax credit which was previously available to them when RST was a Zambian corporation. Since the remedy ordered by the Court may not do justice to the plaintiffs and may in fact prove ineffectual to vindicate their rights, the Court is compelled to hold supplementary proceedings to determine whether any further or different relief is appropriate. Supplementary proceedings are necessary because the present record is not sufficient to allow the Court to frame additional relief, if necessary. The following remedies, about which the record needs further amplification, present themselves as possible alternatives or additions to the extant remedy:

(1) The Twinning Plan;

(2) Awarding damages based on the loss of the tax credits to the non-AMAX shareholders; and

(3) Damages based on the difference between what the shareholders received from AMAX for their interests in RST and what those interests were actually worth.

We shall discuss each of the above alternatives seriatim.

(1) TWINNING.

At the time of the filing of our Opinion, the Court was under the impression that RST Zambia had been dissolved. We have since been advised that it still exists at least as a corporate shell in Zambia. There exists, then, the possibility of reviving the "twinning" proposal which might make it possible to save the tax credits formerly available to the public shareholders of RST. The defendants have argued that the implementation of the "twinning" proposal, although perhaps preserving the tax credits, would create numerous problems. For example, it might make it impossible to comply with the requirement of the nationalization agreement with the Zambian Government that the corporation holding the management and sales contract must own at least 20% of the RCM stock. These questions must be resolved before we could consider entering an order requiring RST International to reconvey the assets to RST Zambia or an order requiring the consummation of the "twinning" proposal. But since the defendants' evidence indicated that the tax credit to American stockholders of RST might be worth half the value of the stock (N. T. 1221), the Court is reluctant to abandon this concept until such time as it becomes clear that this proposal is not feasible. To determine whether the "twinning" proposal is feasible and will result in the restoration of the tax credit to the non-AMAX shareholders of RST, preliminary steps must be taken, among them the following:

(1) An opinion must be secured from the appropriate taxing authorities in the United States, Great Britain and other countries in which non-AMAX shareholders of RST have a similar problem as to whether a transfer of assets under court order from RST International to either RST Zambia or a new Zambian corporation will have the effect of restoring the tax credits to the non-AMAX shareholders;

(2) Assurances must be obtained from the Zambian Government that the transfer of these assets to RST Zambia or a new Zambian corporation will not subject them to Zambian exchange controls and that the "twinning" proposal will not result in any breach of the nationalization agreement with the Zambian Government;

(3) Assurances from the New York and London Stock Exchanges and other exchanges where the stock is traded that the "twinned" security can be freely traded on such exchanges.

The Court will require AMAX to pursue these preliminary steps, assisted by counsel for the plaintiffs, and to advise the Court whether this preliminary investigation reveals that "twinning" is feasible.

(2) The Credit.

A further alternative would be a money judgment to compensate the non-AMAX shareholders for the value of the loss of the tax credits to the non-AMAX shareholders. The only evidence available on this issue indicates that the tax credit may be worth one-half the value of RST stock. (N. T. 1221). In all fairness to the parties, however, the Court will need further evidence in order to make an evaluation of damages for loss of the tax credit.

(3) General Damages.

The appropriate measure of such damages would appear to be the difference in value between the package of securities received as a result of the amalgamation and the actual value of the stockholders' interest in the assets of

RST. As indicated in our November 25, 1970 Opinion, the Court had no doubt that the non-AMAX shareholders' interest in RST substantially exceeded the value paid by AMAX, but we found that on the basis of that record we could not in fairness to the parties place a precise figure on the value of these assets. This does not mean that the plaintiffs failed to carry the burden of proving damages but merely that, in view of the expedited manner in which the case was tried pursuant to the Order of the Court of Appeals, time did not permit the type of discovery which would be necessary in order to present satisfactory evidence as to the precise dollar amount of damages suffered by the plaintiffs. Indeed, on reflecting on the issue of damages in this case, the Court seriously considered the appointment of a Master to assist the Court in determining the amount of damages,[1] and, further, considered calling independent expert witnesses to assist in the evaluation of certain of the assets, particularly Baluba and Fiji. However, there simply was not time, in view of the Order of the Court of Appeals, to implement the above procedures. Nor was there time, nor has there yet been time, to determine whether the remedy fashioned by the Court in our Order of November 25, 1970 is feasible and equitable.

In summary, as to remedy, we will proceed as follows. First, the Court will order AMAX to take all necessary steps to investigate whether the "twinning" proposal is feasible. Second, the Court will order a supplementary hearing to be held on the question of remedy, where further evidence may be adduced in order to aid the Court in fashioning an appropriate final equity decree. The Court has taken the above steps, confident that the Court of Appeals will not permit an expedited trial order to deprive this Court of its duty to work justice between these parties.

---

1. See Federal Rule of Civil Procedure 53.

ORDER.

AND NOW, this 15th day of January, 1971, plaintiffs' motion to amend and supplement the judgment of November 25, 1970, is and the same is hereby GRANTED as follows:

(1) that defendant American Metal Climax, Inc., (AMAX) shall cause Morgan Guaranty Trust Company of New York (Morgan) to pay forthwith to the non-AMAX holders of Roan Selection Trust Limited (RST) American depository receipts (ADRs) of record as of September 25, 1970, the following monies being held by Morgan:

(a) the dividends of RCM heretofore voted, payable October 1, 1970 and January 5, 1971 in the respective amounts of $.1376 and $.0614 per ADR share;

(b) the interest payable October 1, 1970 on the Zimco bonds, in the amount of $.09 per ADR share; and

(c) the interest on such monies pursuant to the Order of August 31, 1970 of the Court of Appeals for the Third Circuit.

(2) that defendant AMAX shall cause the interest on AMAX debentures payable January 1, 1971 to holders of record of such debentures as of December 13, 1970 to be promptly paid by Morgan to holders of record as of such date of (a) ADRs in the amount of $.24 per ADR and (b) AMAX debentures under that indenture;

(3) that defendant AMAX shall take all necessary steps to ensure the prompt payment of any future RCM dividend to the then holders of record of (a) ADRs at the rate of one-fifth of the amount payable to each RCM share, and (b) RCM shares at the declared rate per share, until further Order of the Court;

(4) that defendant AMAX shall take all necessary steps to ensure the prompt payment of the interest and principal to be paid subsequent to January 1, 1971 on the AMAX debentures and Zimco bonds to the then holders of record of (a) ADRs at the rate of $.24 and $.12 per year, respectively, per ADR, and (b) AMAX debentures and Zimco bonds under the respective indentures, until further Order of this Court;

(5) that all expenses, including expenses of this litigation and expenses paid by RST, or out of its property, arising out of, or incident to, the amalgamation with AMAX, shall be assessed as damages against AMAX, and shall be paid by AMAX in such amounts as may hereafter be determined subsequent to the final disposition of all appeals from this Court's final Order, such damages to be assessed at the same time as the determination of counsel fees, as to which decision is likewise reserved until after final disposition of all such appeals;

(6) defendant shall take all necessary steps to investigate whether the "twinning" plan is feasible in accordance with this Opinion and shall report to the Court at reasonable intervals with regard to its investigation. Further, the defendants shall immediately take all steps necessary, including proceedings before the High Court of Zambia, to retain RST's status as a Zambian corporation;

(7) that a supplementary proceeding be held at a date to be fixed by the Court on the issue of the remedy to be applied in this case;

(8) defendant shall advise the Court worthwith as to what steps, if any, it has taken to comply with or implement our Order of November 25, 1970.

/s/ Thomas A. Masterson, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CLASS ACTION
CIVIL ACTION NO. 70-933.

HAROLD E. KOHN, TRUSTEE, ET AL.,
Plaintiffs

v.

AMERICAN METAL CLIMAX, INC.

and

ROAN SELECTION TRUST, LIMITED, ET AL.,
Defendants.

ORDER.

AND NOW, this 16th day of January, 1971, it is hereby ORDERED that our Order of January 15, 1971, is AMENDED to read as follows:

(1) That defendant American Metal Climax, Inc., (AMAX) shall cause Morgan Guaranty Trust Company of New York (Morgan) to pay forthwith to the non-AMAX holders of Roan Selection Trust Limited (RST) American depositary receipts (ADRs) of record as of January 16, 1971, the following monies being held by Morgan:

(a) the dividends of RCM heretofore voted, payable October 1, 1970 and January 5, 1971 in the respective amounts of $.1376 and $.0614 per ADR share;

(b) the interest and principal payable October 1, 1970 on the Zimco bonds, in the amount of $.1616 per ADR share; and

(c) the interest on such monies pursuant to the Order of August 31, 1970 of the Court of Appeals for the Third Circuit;

(2) That defendant AMAX shall cause the interest on AMAX debentures payable January 1, 1971 to the holders of record of such debentures as of December 15, 1970 to be promptly paid by Morgan to holders of record of ADRs as of January 16, 1971 in the amount of $.24 per ADR;

(3) That defendant AMAX shall take all necessary steps to ensure the prompt payment by Morgan of any future RCM dividend to the then holders of record of ADRs as of the payment date of such dividend at the rate of one-fifth of the amount payable to each RCM share;

(4) That defendant AMAX shall take all necessary steps to ensure the prompt payment by Morgan of the interest and principal to be paid subsequent to January 1, 1971 on the AMAX debentures and Zimco bonds to the then holders of record of ADRs as of the payment date of such interest and principal;

(5) That all expenses, including expenses of this litigation and expenses paid by RST, or out of its property, arising out of, or incident to, the amalgamation with AMAX, shall be assessed as damages against AMAX, and shall be paid by AMAX in such amounts as may hereafter be determined subsequent to the final disposition of all appeals from this Court's final Order, such damages to be assessed at the same time as the determination of counsel fees,

as to which decision is likewise reserved until after final disposition of all such appeals;

(6) Defendant, in conjunction with counsel for the plaintiffs, shall take all necessary steps to investigate whether the "twinning" plan is feasible in accordance with this Opinion and shall report to the Court at reasonable intervals with regard to its investigations. Further, the defendants shall immediately take all steps necessary, including proceedings before the High Court of Zambia, to retain RST's status as a Zambian corporation;

(7) That a supplementary proceeding be held at a date to be fixed by the Court on the issue of the remedy to be applied in this case;

(8) Defendant shall advise the Court forthwith as to what steps, if any, it has taken to comply with or implement our Order of November 25, 1970.

/s/ THOMAS A. MASTERSON, *J.*

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLASS ACTION

CIVIL ACTION NO. 70-933.

HAROLD E. KOHN, TRUSTEE, ET AL.

Plaintiffs,

v.

AMERICAN METAL CLIMAX, INC.

and

ROAN SELECTION TRUST, LIMITED, ET AL.

Defendants.

ORDER.

AND NOW, this 18th day of January, 1971, upon consideration of the proposed stipulation and order which is attached hereto and marked "Exhibit A" and the attachments thereto;

AND, after a hearing at which the Court was advised that counsel for the plaintiffs asked that the Court's Order of January 16, 1971 be amended to change the record date for the payment of dividends, interest and principal referred to therein from January 16, 1971 to January 29, 1971 to comply with the rules of the New York Stock Exchange and to avoid confusion in the trading of the securities;

AND, the Court being advised that counsel for the defendants do not object to such a change but do not agree to

it, it is hereby ORDERED AND DECREED that Paragraphs (1) and (2) of our Order of January 16, 1971 are amended *nunc pro tunc* to read as follows:

"(1) that defendant American Metal Climax, Inc. (AMAX), shall cause Morgan Guaranty Trust Company of New York (Morgan) to pay forthwith to the non-AMAX holders of Roan Selection Trust Limited (RST) American depositary receipts (ADRs) of record as of January 29, 1971, the following monies being held by Morgan:

(a) the dividends of RCM heretofore voted, payable October 1, 1970 and January 5, 1971 in the respective amounts of $.1376 and $.0614 per ADR share;

(b) the interest and principal payable October 1, 1970 on the Zimco bonds, in the amount of $.1616 per ADR share; and

(c) the interest on such monies pursuant to the Order of August 31, 1970 of the Court of Appeals for the Third Circuit.

(2) that defendant AMAX shall cause the interest on AMAX debentures payable January 1, 1971 to holders of record of such debentures as of December 15, 1970 to be promptly paid by Morgan to holders of record of ADRs as of January 29, 1971 in the amount of $.24 per ADR."

/s/ THOMAS A. MASTERSON, *J.*

EXHIBIT "A".

STIPULATION AND ORDER

AND NOW, this 18th day of January, 1971 it is hereby stipulated by and between counsel for plaintiffs and counsel for defendants that Paragraphs (1) and (2) of the Order dated January 16, 1971 is amended to read as follows:

"(1) that defendant American Metal Climax, Inc. (AMAX), shall cause Morgan Guaranty Trust Company of New York (Morgan) to pay forthwith to the non-AMAX holders of Roan Selection Trust Limited (RST) American depositary receipts (ADRs) of record as of January 29, 1971, the following monies being held by Morgan:

(a) the dividends of RCM heretofore voted, payable October 1, 1970 and January 5, 1971 in the respective amounts of $.1376 and $.0614 per ADR share;

(b) the interest and principal payable October 1, 1970 on the Zimco bonds, in the amount of $.1616 per ADR share; and

(c) the interest on such monies pursuant to the Order of August 31, 1970 of the Court of Appeals for the Third Circuit.

(2) that defendant AMAX shall cause the interest on AMAX debentures payable January 1, 1971 to holders of record of such debentures as of December 15, 1970 to be promptly paid by Morgan to holders of record as ADRs as of January 29, 1971 in the amount of $.24 per ADR."

It is further stipulated that the aforesaid amendment was requested by Morgan pursuant to its letter dated January 18, 1971 to defendant AMAX, attached hereto as Exhibit "A", to conform with the applicable rules and practices concerning the payments of dividends, interest and

other similar items of the New York Stock Exchange as set forth in its letter to Morgan dated January 18, 1971, attached hereto as Exhibit "B", and that the Court has jurisdiction to make such amendment in order to so conform.

STUART H. SAVETT
2600 The Fidelity Building
Philadelphia, Penna. 19109
Attorney for Plaintiffs

MORRIS R. BROOKE
1100 Philadelphia National Bank Bldg.
Philadelphia, Penna. 19107
Attorney for Defendants

EXHIBIT "A".

MORGAN GUARANTY TRUST COMPANY
OF NEW YORK

January 18, 1971

American Metal Climax, Inc.
1270 Avenue of the Americas
New York, New York 10020

Attention: Mr. Erwin A. Weil
Secretary

Dear Sirs:

Your counsel, Sullivan & Cromwell, has furnished us a copy of the order dated January 15, 1971 as amended by the order dated January 16, 1971 of the United States District Court for the Eastern District of Pennsylvania in the matter of *Kohn v. American Metal Climax Inc. and Roan Selection Trust Limited, et al.*, wherein the Court orders American Metal Climax Inc. ("Amax"), among other

things, to cause Morgan Guaranty Trust Company of New York, Depositary of ADRs representing ordinary shares of Roan Selection Trust Limited ("RST"), to pay holders of record as of January 16, 1971 certain dividend, principal and interest payments accruing on the shares of Roan Consolidated Mines Limited, Zimco bonds and Amax debentures, as well as interest thereon.

As you know, the ADRs are listed and traded on the New York Stock Exchange ("NYSE"). Under the Listing Agreement dated June 14, 1955 (amended under date of April 27, 1962 and October 26, 1964) between the Depositary and the NYSE the Depositary is required to give to the NYSE ten days notice in advance of the establishment of a record date. Based on this record date the NYSE then establishes an "ex-date" four full business days prior to the record date.

Accordingly, it is apparent that the establishment of a record date in accordance with the order of the Court would be in violation of the NYSE Listing Agreement. Of more importance to the holders of the ADRs who have purchased the ADRs during the week of January 11th for settlement commencing January 18th, the January 16th record date will not entitle such holders to the accrued rights on the ADRs so purchased.

A copy of the order has been furnished to the Department of Stock List of the NYSE and we have discussed these mutual problems. Enclosed is a letter of the Department setting forth their position and indicating that they have halted trading in the ADRs pending further clarification.

After discussing the foregoing with the NYSE it is our recommendation that, in order to continue orderly trading in the ADRs, the Court give prompt consideration to further amending its order of January 16, 1971 so as to permit

the Depositary to establish a new record date of January 29, 1971.

We request that you instruct your counsel to furnish a copy of this letter, together with the enclosed letter of the Department of Stock List, to the Court.

Very truly yours,

/s/ R. E. MOXLEY
R. E. Moxley
Vice President

CC: Mr. W. Loeber Landau
Sullivan & Cromwell

Mr. Marvin Schwartz
Sullivan & Cromwell

Mr. Stuart Savitt
Harold E. Kohn

Mr. Carl Rossel
New York Stock Exchange

Mr. Samuel Pryor
Davis Polk & Wardwell

dlk

EXHIBIT "B".

NEW YORK STOCK EXCHANGE

January 18, 1971

Mr. R. E. Moxley, Vice President
Morgan Guaranty Trust Company of New York
23 Wall Street
New York, New York 10005

Dear Sir:

We have received a copy of the order dated January 15, 1971 as amended on January 16, 1971 which orders American Metal Climax Inc. to cause Morgan Guaranty Trust Company of New York to establish a record date as of January 16, 1971 for certain distributions to the registered holders of Roan Selection Trust ADR's.

As you know, the listing requirements of the Exchange which are designed to protect the investing public provide that at least 10 days advance notice be given of the establishment of a record date for any purpose. The reason for such requirement is to allow the security to be properly traded in advance of the record date on an ex-distribution basis. Otherwise, purchasers of securities on a "cum-distribution" (with distribution) basis can suffer loss if the distribution to which they are entitled is made to a seller who is the shareholder on a record date prior to the time the securities are delivered.

We are enclosing a copy of our letter dated December 16, 1970 to Sullivan & Cromwell which we understand was previously submitted to the Court.

In light of the confusion resulting from the order to establish this record date without adequate advance notice, the Exchange determined to halt trading at the opening

of business today in the ADRs of Roan Selection Trust Ltd. until the situation can be clarified. We understand that you are submitting today a letter to American Metal Climax, Inc. for submission to the Court requesting that the order be modified to permit establishing a record date in accordance with the rules of this Exchange.

Cordially,

/s/ MERLE S. WICK

Enc.

December 16, 1970

Messrs. Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Dear Sirs:

This will confirm my advice to you that at present the American Depositary Receipts of Roan Selection Trust Limited do not trade on the New York Stock Exchange on a "ex-distribution" "ex-dividend" or "ex-interest" basis—that is, a purchaser of these Receipts acquires all rights which the seller has to the cash and securities on deposit in respect of these receipts with Morgan Guaranty Trust Company.

These American Depositary Receipts could not be traded on an "ex" basis unless and until this Exchange were notified by Morgan Guaranty Trust Company that a distribution was to be made to the holders of the receipts, a record date to determine the holders entitled to such distribution had been established, and there was no uncertainty or other possible restriction as to such distribution being made.

Very truly yours,

MERLE S. WICK
Vice President

CFR:lmj

IN THE
HIGH COURT FOR ZAMBIA

AT THE PRINCIPAL REGISTRY
BEFORE MR. JUSTICE MAGNUS IN COURT
FRIDAY THE 14TH DAY OF AUGUST 1970

IN THE MATTER OF
THE COMPANIES ORDINANCE

and

IN THE MATTER OF
ROAN SELECTION TRUST LIMITED

ORDER.

UPON THE PETITION of the above names Roan Selection Trust Limited (hereinafter called "the Company") whose registered office is situate at Mpelembe House, Brodway, Ndola, Zambia on the 6th August 1970 preferred unto this Court

AND UPON HEARING Counsel for the Company

AND UPON READING the said Petition the Order dated the 9th June 1970 (whereby it was ordered subject to the provisions thereof that the said Petition be placed in the paper for hearing on the 14th August 1970) the Order dated the 6th August 1970 (whereby it was ordered that subsections (1) (2) and (3) of section 17(2) of the above mentioned Ordinance should not apply as regards any class of creditors of the said Company) the "Times of Zambia" (Zambia) "The Times" (United Kingdom) and "The New York Times" (United States of America) newspapers of

the 7th August 1970 and the "Rand Daily Mail" (South Africa) newspaper of the 8th August 1970 (each containing a notice of the presentation of the said Petition and that the same was appointed to be heard this day) the Affidavit of Ivor Gordon Kennington the Affidavit of W. Richard Bingham the Affidavit of Richard S. Simmons and the Affidavit of Robert E. Murray all filed the 5th August 1970 the Affidavit of Sir Ronald Lindsay Prain filed 6th August 1970 the Affidavit of Robert Hurst Page the further two Affidavits of Richard S. Simmons and the Affidavit of Robert E. Murray all filed the 14th August 1970 and the exhibits in the said Affidavits or some of them respectively referred to and having heard the oral evidence of Richard Sheridan Simmons and Whoolook Richard Bingham

And the Court being of opinion that the reduction of capital of the Company hereinafter referred to is fair and reasonable to all the shareholders of the Company

This Court Doth Order That the reduction of the capital of the said Company from £100,000,000 to £49,222,264 resolved on and effected by a Special Resolution passed at an Extraordinary General Meeting of the said Company held on the 6th August 1970 be and the same is hereby confirmed in accordance with the provisions of the above mentioned Ordinance

And the Court Doth Hereby Approve the Minute set forth in the Schedule hereto

And It Is Ordered that this Order be forthwith produced to the Registrar of Companies and that an Office Copy thereof be delivered to him together with a copy of the said Minute

AND IT IS ORDERED that notice of the registration by the Registrar of Companies of this Order and of the said Minute be published once in the "Times of Zambia" (Zambia) "The Times" (United Kingdom) "The New York Times" (United States of America) and the "Rand Daily Mail" (South Africa) newspapers within 21 days after such registration liberty to apply

This Order was taken up by Messrs. Ellis & Co. of Farmere House, Cairo Road, Lusaka Solicitors for Roan Selection Trust Limited

The Schedule before referred to Minute approved by the Court

"The capital of Roan Selection Trust Limited was by virtue of a Special Resolution and with the sanction of an Order of the High Court dated the 14th August 1970 reduced from £100,000,000 divided into 50,000,000 shares of £2 each to £49,222,264 divided into 24,611,132 shares of £2 each. At the date of the registration of this Minute 18,606,958 of the said shares have been issued and are deemed to be fully paid up and the remaining shares are unissued".